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Editor's Note

Welcome to Volume 6 Issue 3 of the *Journal of Conflict Management and Sustainable Development.*

The Journal is a publication dedicated to scholarly discourse and academic interaction on the subjects of conflict management and sustainable development. It provides insight, analysis and suggestions on achieving sustainable development through effective conflict management.

The Journal has grown in audience since its launch. It is widely cited as one of the most authoritative and credible sources in the areas of Conflict Management and Sustainable Development. It is a valuable resource for scholars, academics, policy makers, students and anyone seeking information in the fields of conflict management and sustainable development. The journal is peer reviewed and refereed so as to ensure the highest quality of academic standards and credibility of information.

This issue delves into pertinent themes in the fields of conflict management and sustainable development including: *Recognising a Human Right to Safe, Healthy and Sustainable Environment; The Dynamics of Public Procurement of Legal Services in Kenya; Adopting Information Technology in the Legal Profession in Kenya as a Tool of Access to Justice; Effects of Climate Change on Pastoralist Women in the Horn of Africa; Resource Mobilization for Sustainable Development in Kenya; The Human Roots of Ecological Crisis: A Case of Kenya; Reflection on the Structure and Leadership of the Senior Bar in Kenya; Kenya's Sand Harvesting Laws and the Sustainable Development Licence to Operate: In Quicksand.*

Publication of this issue would not have been possible without the tremendous efforts by our committed team of reviewers, editors and contributors. I wish to thank them and everyone who has made publication of this Journal possible.

The editorial team is committed to improving the Journal and steering it to greater heights. We are receptive to feedback from our readers to enable us achieve this goal.

The editorial team welcomes submissions of papers, commentaries, case reviews and book reviews on the themes of Conflict management and Sustainable development or other related fields of knowledge for publication in subsequent issues of the Journal.

These submissions should be channeled to editor@journalofcmsd.net and copied to admin@kmco.co.ke

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May, 2021.

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Recognising a Human Right to Safe, Healthy and Sustainable Environment

By: ***Kariuki Muigua****

Abstract

While the international legal instruments on human rights and environmental protection acknowledge the connection between protection and enjoyment of human rights and the need for conservation and protection of environment, there is yet to be reached a consensus by the main stakeholders at the global level to convince the United Nations to crystalize the human right to a safe, healthy and sustainable environment as an independent right. It is currently treated as a means to an end necessary for the realisation of other human rights instead of being treated as an end in itself. This has continually created enforcement challenges as well as making it difficult to demand accountability from states that violate environmental principles, at the international level as well as in those countries where there is no domestic recognition of the right to clean and healthy environment. This paper makes a case for the need to recognise the human right to safe, healthy and sustainable environment as an independent right capable of being enforced without necessarily making reference to the other human rights, as part of laying the ground for achieving the Sustainable Development agenda.

1. Introduction

Over the years, human activities have posed a major threat to the earth's natural processes which have been strained beyond limits, causing a major environmental crisis.[1] It is worth pointing out that when humans damage the environment, they diminish the quality of life-most immediately for those

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[1] McClymonds JT, 'Human Right to a Healthy Environment: An International Legal Perspective, The' (1992) 37 New York Law School Law Review 583.

directly affected, and in the long term, for everyone.[2] As such, environmental protection and human rights are believed to be interrelated, interconnected, and mutually responsive as both of them are directed towards securing the well-being of humanity, with safe and healthy environment being the pre-condition for the enjoyment of fundamental human rights.[3]

The 1992 United Nations Conference on Development and the Environment was one of the first international efforts towards acknowledging development and environmental protection as complementary objectives.[4] Article 12(2) (b) of the *International Covenant on Economic, Social and Cultural Rights (ICESCR)*[5] requires states parties to improve 'all aspects of environmental and industrial hygiene'. Article 24 of the *African Charter on Human and Peoples' Rights*[6] provides that 'all peoples shall have the right to a general satisfactory environment favourable to their development.' These are just some of the few international and regional legal instruments on human rights that make reference to the need for a clean and healthy environment as a requisite for the achievement of the other human rights.

A new imperative of Sustainable Development demands that environmental considerations become fully integrated into the mainstream of economic decision-making.[7] Over the years, many countries around the world have recognised the right to clean and healthy environment in their national constitutions.[8] Kenya's Constitution recognises this right under Article 42

[2] Popovic NA, 'In Pursuit of Environmental Human Rights: Commentary on the Draft Declaration of Principles on Human Rights and the Environment' (1995) 27 Colum. Hum. Rts. L. Rev. 487.
[3] Pathak P, 'Human Rights Approach to Environmental Protection' (Social Science Research Network 2014) SSRN Scholarly Paper ID 2397197 <https://papers.ssrn.com/abstract=2397197> accessed 31 March 2021.
[4] Mink SD, 'Poverty, Population, and the Environment' [1993] World Bank discussion papers (USA).
[5] UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3.
[6] Organization of African Unity (OAU), *African Charter on Human and Peoples' Rights ("Banjul Charter")*, 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).
[7] Mink SD, 'Poverty, Population, and the Environment' [1993] World Bank discussion papers (USA).
[8] Boyd DR, 'The Effectiveness of Constitutional Environmental Rights', *Paper for Yale UNITAR Workshop, on April* (2013);

which provides that 'every person has the right to a clean and healthy environment, which includes the right—to have the environment protected for the benefit of present and future generations through legislative and other measures, particularly those contemplated in Article 69; and to have obligations relating to the environment fulfilled under Article 70'.[9] The constitutionalisation of human right to a clean and healthy environment and the principle of sustainable development under the 2010 Constitution of Kenya has been hailed as an important development in environmental law in Kenya, representing environmental constitutionalism and sustainability constitutionalism, respectively.[10]

The proponents of constitutionalisation of environmental rights argue that the potential benefits of constitutional environmental rights include: stronger environmental laws and policies; improved implementation and enforcement; greater citizen participation in environmental decision-making; increased accountability; reduction in environmental injustices; a level playing field with social and economic rights; and better environmental performance.[11] On the other hand, those against the approach argue that constitutional environmental rights are: too vague to be useful; redundant because of existing human rights and environmental laws; a threat to democracy because they shift power from elected legislators to judges; not enforceable; likely to cause a flood of litigation; and likely to be ineffective.[12] Thus, the question is yet to be settled although an impressive number of countries have opted for this approach to environmental rights. It is estimated that since the right's first mention in the Stockholm Declaration in 1972 – a result of the first major environmental conference- more than 100 constitutions across the world have adopted a human right to a healthy environment, often serving as a powerful tool to protect the natural world.[13]

[9] Article 42, Constitution of Kenya 2010.
[10] Mwanza R, 'The Relationship between the Principle of Sustainable Development and the Human Right to a Clean and Healthy Environment in Kenya's Legal Context: An Appraisal' (2020) 22 Environmental Law Review 184.
[11] Boyd DR, 'The Effectiveness of Constitutional Environmental Rights', *Paper for Yale UNITAR Workshop, on April* (2013), 5.
[12] Ibid.
[13] Zimmer K, 'The Human Right That Benefits Nature' <https://www.bbc.com/future/article/20210316-how-the-human-right-to-a-healthy-environment-helps-nature> accessed 31 March 2021; Katarina Zimmer, 'The Human

Despite this initiative by several countries, there is still the contention over the actual status of the right to clean and healthy environment under the international legal framework on human rights.[14] Indeed, few international agreements explicitly refer to environmental human rights.[15]

The lack of explicit language on environmental rights in any international and/or national legal instrument has been associated with possible environmental degradation and lack of accountability as it may create a legal vacuum which allows the State to engage in a variety of forms of environmental mismanagement within a legal context that lack effective avenues for legal recourse.[16] This paper makes a case for the need for express recognition of the human right to a safe, healthy and sustainable environment as an independent right under the international law, without necessarily tying anchoring it to the rest of the human rights, for ease of enforcement and demanding accountability from states for both international community as well as citizens.

2. Safe, Healthy and Sustainable Environment: The Elements

A safe, clean, healthy and sustainable environment is considered to be integral to the full enjoyment of a wide range of human rights, including the rights to life, health, food, water and sanitation.[17] Arguably, the human right to a healthy environment – encompassing clean and balanced ecosystems, rich biodiversity and a stable climate – recognises that nature is a keystone of a dignified human existence, in line with a wealth of scientific evidence linking human welfare and the natural world.[18] Thriving ecosystems are important for

Right That Benefits Nature' <https://www.bbc.com/future/article/20210316-how-the-human-right-to-a-healthy-environment-helps-nature> accessed 31 March 2021.

[14] 'Legal Analysis: The Right to a Healthy Environment in Australia' (*Environmental Defenders Office*, 8 January 2020) <https://www.edo.org.au/2020/01/09/right-to-healthy-environment-in-australia/> accessed 31 March 2021.

[15] 'Appalachia Puts Environmental Human Rights to the Test' (*YES! Magazine*) <https://www.yesmagazine.org/environment/2018/01/17/appalachia-puts-environmental-human-rights-to-the-test> accessed 31 March 2021.

[16] Mwanza R, 'The Relationship between the Principle of Sustainable Development and the Human Right to a Clean and Healthy Environment in Kenya's Legal Context: An Appraisal' (2020) 22 Environmental Law Review 184.

[17] 'Dr. David R. Boyd' (*UN Special Rapporteur |on Human Rights and the Environment*) <http://srenvironment.org/node/556> accessed 30 March 2021.

[18] Zimmer K, 'The Human Right That Benefits Nature'

provision of clean water and air, yield seafood and pollinators, and soaking up greenhouse gases.[19]

The procedural elements of the right to clean, safe and healthy environment are access to information, public participation, and access to justice/effective remedies[20] while the substantive elements include clean air, a safe climate, access to safe water and adequate sanitation, healthy and sustainably produced food, non-toxic environments in which to live, work, study and play, and healthy biodiversity and ecosystems.[21]

The right to clean and healthy environment which is often classified as part of third-generation "solidarity" rights is seen as an important right for protecting people individually-a characteristic shared by all human rights- by imposing more effective obligations on governments and by providing individual remedies for environmental deprivations.[22] Collectively, just like all other 'third-generation' rights- the right to clean and healthy environment calls for collective action and cooperation from all persons in taking care of the environment.[23]

The right to a healthy environment has been hailed by some scholars as capable of acting as a crucial legal pathway to protecting the natural world, both by encouraging governments to pass stronger environmental laws and allowing courts to hold violators accountable and this is especially so when installed into constitutions, where such rights are taken seriously by many judicial systems and become hard to undo, creating an enduring force counteracting the interests against protecting nature.[24] Notably, the right to a

<https://www.bbc.com/future/article/20210316-how-the-human-right-to-a-healthy-environment-helps-nature> accessed 31 March 2021.

[19] Ibid.

[20] Knox JH, 'Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment: Biodiversity Report' [2017] United Nations Human Rights Council, A/HRC/34/49.

[21] Ibid.

[22] McClymonds JT, 'Human Right to a Healthy Environment: An International Legal Perspective, The' (1992) 37 New York Law School Law Review 583.

[23] Ibid, 583.

[24] Katarina Zimmer, 'The Human Right That Benefits Nature'

healthy environment requires governments to carry out the following obligations: to refrain from interfering directly or indirectly with the enjoyment of the right to a healthy environment; to prevent third parties such as corporations from interfering in any way with the enjoyment of the right to a healthy environment; and, to adopt the necessary measures to achieve the full realisation of the human right to a safe and healthy environment.[25]

3. Place of Safe, Healthy and Sustainable Environment in the Sustainable Development Agenda

Arguably, human rights and the environment are intertwined; human rights cannot be enjoyed without a safe, clean and healthy environment; and sustainable environmental governance cannot exist without the establishment of and respect for human rights.[26]

It has rightly been pointed out that nearly 92 percent of pollution-related deaths occur in low-income and middle-income countries where children face the highest risks because small exposures to chemicals in utero and in early childhood can result in lifelong disease, disability, premature death, as well as reduced learning and earning potential.[27]

Notably, environmental rule of law is indispensable for ensuring just and sustainable development outcomes, and guaranteeing fundamental rights to a healthy environment, where the concept of environmental law includes the following elements: adequate and implementable laws, access to justice and information, inclusion and equity in public participation, accountability,

<https://www.bbc.com/future/article/20210316-how-the-human-right-to-a-healthy-environment-helps-nature> accessed 31 March 2021.

[25] Ruppel, Oliver C., "Third-generation human rights and the protection of the environment in Namibia." *Human rights and the rule of law in Namibia. Windhoek: Macmillan Education Namibia* (2008): 101-120, 103.

[26] Environment UN, 'What Are Environmental Rights?' (*UNEP - UN Environment Programme*, 2 March 2018) <http://www.unep.org/explore-topics/environmental-rights-and-governance/what-we-do/advancing-environmental-rights/what> accessed 30 March 2021.

[27] 'Dr. David R. Boyd' (*UN Special Rapporteur |on Human Rights and the Environment*) <http://srenvironment.org/node/556> accessed 30 March 2021.

transparency and liability for environmental damage, fair and just enforcement, and human rights.[28]

The *United Nations Sustainable Development Goals (SDGs)*[29] are a set of 17 goals with 169 targets that all UN Member States have agreed to work towards achieving by the year 2030.[30] These goals and targets are all designed around ensuring that the environment is not only well protected but also that the resultant ecosystem services are used in meeting the economic and social needs of the human beings, both current and future generations.[31] As such, a safe, healthy and sustainable environment is a central element of the sustainable development agenda. The SDGs framework consists of 17 goals for environmental sustainability, social inclusion, economic development, peace, justice, good governance and partnership.[32] As such, sustainable development is seen as one of the most important aspects and methods used to conserve natural resources, as it recognizes that growth must be both inclusive and environmentally sound to reduce poverty and also build prosperity for the present population in addition to meeting the needs of future generations.[33]

[28] 'Climate Change - A Comparative Overview of the Rights Based Approach in the Americas | InforMEA' <https://www.informea.org/en/literature/climate-change-comparative-overview-rights-based-approach-americas> accessed 1 April 2021.
[29] UN General Assembly, *Transforming our world: the 2030 Agenda for Sustainable Development*, 21 October 2015, A/RES/70/1.
[30] 'Sustainable Development Goals' <https://www.who.int/westernpacific/health-topics/sustainable-development-goals> accessed 1 April 2021.
[31] Ibid.
[32] 'Sustainable Development - an Overview | ScienceDirect Topics' <https://www.sciencedirect.com/topics/earth-and-planetary-sciences/sustainable-development> accessed 1 April 2021.
[33] Muralikrishna IV and Manickam V, 'Chapter Two - Sustainable Development' in Iyyanki V Muralikrishna and Valli Manickam (eds), *Environmental Management* (Butterworth-Heinemann2017) <https://www.sciencedirect.com/science/article/pii/B9780128119891000026> accessed 1 April 2021.

4. Human Right to Safe, Healthy and Sustainable Environment: Prospects and Challenges

The human right to safe, healthy and sustainable environment is generally considered to be part of the environmental rights. Notably, environmental impacts on health are uneven across age and mostly affect the poor.[34]

It has rightly been pointed out that although there is clear scientific consensus on the benefits of nature to people, the evolution of nature as a human right has been remarkably patchy around the world with many Latin American countries forging ahead while Europe and North America lag somewhat behind.[35]

Worth pointing out is the observation that the elements of the right to a healthy environment, such as a safe climate and healthy biodiversity and ecosystems, are facing complex and systemic challenges that affect all people and living beings.[36] While there is no doubt on the important role played by the environment in supporting all life on the earth, progress towards recognising the human right to safe, healthy and sustainable development as a fully-fledged right under the international law has been slow and instead has been replaced with the 'greening' of human rights, such as the right to life and right to property, as people increasingly recognise how environmental degradation affects the ability to enjoy these rights.[37]

As things currently stand, the Office of the High Commissioner on Human Rights emphasizes that "while the universal human rights treaties do not refer to a specific right to a safe and healthy environment, the United Nations

[34] Mink SD, 'Poverty, Population, and the Environment' [1993] World Bank discussion papers (USA).
[35] Katarina Zimmer, 'The Human Right That Benefits Nature' <https://www.bbc.com/future/article/20210316-how-the-human-right-to-a-healthy-environment-helps-nature> accessed 31 March 2021.
[36] Ituarte-Lima C, 'I Thriving in the Anthropocene: Why the Human Right to a Healthy Environment', 20 < https://elearning.rwi.or.id/storage/app/media/uploaded-files/i-ituarte-lima-c-thriving-in-the-anthropocene-why-the-human-right-to-a-healthy-environment-2020.pdf> 30 March 2021.
[37] Ituarte-Lima C, 'I Thriving in the Anthropocene: Why the Human Right to a Healthy Environment', 27 < https://elearning.rwi.or.id/storage/app/media/uploaded-files/i-ituarte-lima-c-thriving-in-the-anthropocene-why-the-human-right-to-a-healthy-environment-2020.pdf> 30 March 2021.

human rights treaty bodies all recognize the intrinsic link between the environment and the realization of a range of human rights, such as the right to life, to health, to food, to water, and to housing."[38]

The main contention between those in support and those against the full recognition of the right to safe and healthy environment as an independent human right lies between anthropocentricism and ecocentrism approaches to conservation, where anthropocentrism means that the whole universe revolves around the interests of human-kind and that all human activities are human-centred, while ecocentrism is a collection of views that is theoretically in contrast with anthropocentrism.[39] The debate between the two groups is informed by three approaches in relation to the relationship between human rights and environmental protection which are as follows: the first approach is one where environmental protection is seen as a possible means of fulfilling human rights standards, that is, the end is fulfilling human rights, and the route is through environmental law; the second approach states that 'the legal protection of human rights is an effective means to achieving the ends of conservation and environmental protection (greening of existing human rights); and the third approach to the question of 'human rights and the environment' is to deny the existence of any formal connection between the two at all, that is, with the growth and development of international environmental law as well as internationalization of domestic environments of states, it is unnecessary to have a separate human right to a decent environment.[40] Thus, the debate is about either 'greening' of existing human rights law or the addition of new rights to existing treaties.[41] Some scholars,

[38] Boyle, Alan, "Human rights and international environmental law: Some current problems," *Электронный ресурс].–Режим доступа: http://www.eui.eu/Documents/DepartmentsCentres/Law/ResearchTeaching/WorkingGroups/08-03-HumanRights. pdf (дата обращения: 10.04. 2014 г.)* (2011).

[39] Leib LH, 'Historical and Philosophical Underpinnings of the Environmental Movement', *Human Rights and the Environment* (Brill 2011), 12 <https://www.jstor.org/stable/10.1163/j.ctt1w8h1t2.5> accessed 1 April 2021.

[40] Pathak P, 'Human Rights Approach to Environmental Protection' (Social Science Research Network 2014) SSRN Scholarly Paper ID 2397197, 18-19<https://papers.ssrn.com/abstract=2397197> accessed 1 April 2021.

[41] Ibid, 19.

however, believe that environmental law, in absence of hard law documents, appears to be lagging in dealing with emerging environmental problems.[42]

It is worth pointing out that while there are a number of international legal instruments that recognise the need for clean and healthy environment as a prerequisite for enjoyment of other rights, these references relating to the environment are attached to a particular issue and do not recognise the human right to a quality environment as an independent right.[43] This lack of consensus among the different stakeholders thus means that the world might have to wait a little longer to attain consensus and move the United Nations to finally recognise the right to a safe, healthy and sustainable environment as an independent right capable of being enforced without necessarily treating its importance as inherently linked to the realisation of other rights. That is, recognising the right would move it from being treated as a means to an end to an end in itself.

5. Recognising a Human Right to Safe, Healthy and Sustainable Environment

A safe, clean, healthy and sustainable environment is now treated as an integral element to the full enjoyment of a wide range of human rights, including the rights to life, health, food, water and sanitation.[44] As already pointed out, while countries around the world have continually acknowledged and entrenched environmental rights into their national constitutions, there are few international legal instruments that expressly recognise the right to clean and healthy environment. As a result, there have been a strong call for the recognition of the right to a healthy environment in a global instrument such as a resolution by the General Assembly by various actors including current UN Special Rapporteur on Human Rights and Environment, although this is yet to be acted upon.[45]

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[42] Ibid, 19.

[43] Ibid, 20.

[44] 'Dr. David R. Boyd' (*UN Special Rapporteur |on Human Rights and the Environment*) <http://srenvironment.org/node/556> accessed 31 March 2021.

[45]'OHCHR | Right to a Healthy and Sustainable Environment' <https://www.ohchr.org/EN/Issues/Environment/SREnvironment/Pages/HealthySustainable.aspx> accessed 1 April 2021.

In order to ensure that the victims of environmental degradation are protected by the laws and mechanisms established to address human rights abuses, it has been suggested that efforts aimed at natural resource preservation should also incorporate measures aimed at addressing human impacts of environmental abuse.[46] In addition, it has been argued that linking human rights with the environment creates a rights-based approach to environmental protection that places the people harmed by environmental degradation at its centre.[47] Furthermore, it has been suggested that articulating the fundamental rights of peoples with respect to the environment creates the opportunity to secure those rights through human rights bodies in an international forum as well as the national tribunals.[48] Kenya has notably made steps in the right direction as far as recognising the justiciable nature of the right to clean and healthy environment is concerned.[49] For now, it seems that the only way to ensure that the right to safe and healthy environment is justiciable is through domestic initiatives, where governments include the right to clean and healthy environment under in their countries' constitutions.[50] There is a need for stakeholders to continually engage and encourage countries to adopt as a human right a safe, healthy and sustainable environment in their constitutions and/or statutes, as a step towards achieving global consensus on the same for the ultimate goal of an international legal instrument on the same.

6. Conclusion

Arguably, recognising the human right to a healthy environment will go a long way in protecting people and nature, as well as ensuring that there

[46] Pathak P, 'Human Rights Approach to Environmental Protection' (Social Science Research Network 2014) SSRN Scholarly Paper ID 2397197, 17 <https://papers.ssrn.com/abstract=2397197> accessed 31 March 2021.
[47] Ibid, 17.
[48] Ibid, 17.
[49] See *Peter K. Waweru v Republic [2006] eKLR*, Mis.Civl Appli.No. 118 OF 2004; *Mohamed Ali Baadi and others v Attorney General & 11 others* [2018] eKLR, Petition 22 of 2012; *Save Lamu & 5 others v National Environmental Management Authority (NEMA) & Another*, Tribunal Appeal No. NET 196 of 2016, (2019) eKLR.
[50] Mwanza R, 'The Relationship between the Principle of Sustainable Development and the Human Right to a Clean and Healthy Environment in Kenya's Legal Context: An Appraisal' (2020) 22 Environmental Law Review 184; Schiel R, Langford M and Wilson B, 'Does It Matter? Constitutionalisation, Democratic Governance, and the Right to Water' (2020) 12 Water 350; Boyd DR, 'The Status of Constitutional Protection for the Environment in Other Nations' [2014] David Suzuki Foundation 4.

are conducive conditions for continued Sustainable Development and prosperity, leaving no one behind.[51] While many countries including Kenya, have made impressive steps towards the recognition and enforcement of the human right to a safe, healthy and sustainable environment, there is still no global consensus on the need to recognise it as an independent right without necessarily anchoring it on the other basic human rights. Such recognition with achieve the dual goal of protecting the environment through ecocentric approaches as well as ensuring that enforcement and accountability of governments and private persons are guaranteed.

Time is ripe for the global environmental community to consider taking this bold step as part of moving towards achieving the SDGs. Recognising the Human Right to a Clean, Healthy and Sustainable Environment is something that should happen now for the sake of the present and future generations.

[51] Ituarte-Lima C, 'I Thriving in the Anthropocene: Why the Human Right to a Healthy Environment', 18 < https://elearning.rwi.or.id/storage/app/media/uploaded-files/i-ituarte-lima-c-thriving-in-the-anthropocene-why-the-human-right-to-a-healthy-environment-2020.pdf> 30 March 2021.

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The Dynamics of Public Procurement of Legal Services in Kenya

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Abstract

This article looks into the dynamics of public procurement of legal services in Kenya, in view of the reality that the legal profession is a self-regulating profession with internal professional laws, rules and regulations that dictate the extent and limits of legal practice in Kenya. The article, therefore, interrogates the unique features of the legal profession that have immense impact on public procurement of legal services and how that in turn affects the process, legislation, rules and regulations that pertain to public procurement generally. The aim is to assert the unique position regarding the procurement of legal services by public entities, and the need for the public procurement legal framework and procuring public entities to accommodate the unique tenets of the legal profession in the public procurement process.

I. Introduction

Procurement is the acquisition of goods, works, services, or any combination thereof, through contractual means such as purchase, rental, lease, hire purchase, license, tenancy, or franchise. Procurement may be done through various methods,[1] including open tendering,[2] two-stage tendering,[3] restricted tendering,[4] direct procurement,[5] request for quotations,[6] competitive negotiations,[7] and request for proposals.[8] Moreover, procurement may be done by a private or public entity. This article is concerned about public procurement, by public entities, particularly the public procurement of legal services in Kenya. Under PPADA, 2015, open tendering is the preferred procurement method for public procurement and an alternative procurement procedure or method may only be used if allowed and upon satisfaction of the conditions for its use as provided under the Act.[9]

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[1] See Public Procurement and Asset Disposal Act, 2015 (No 33 of 2015), Laws of Kenya (PPADA, 2015) s 92.
[2] ibid ss 96-98.
[3] ibid s 99.
[4] ibid s 102.
[5] ibid ss 103-104.
[6] ibid ss 105-106.
[7] Ibid ss 131-132.
[8] ibid s 116.
[9] ibid s 91.

The legal framework on public procurement of goods and services and asset disposal in Kenya is founded on article 227 of the Constitution of Kenya, 2010 (the Constitution)—procurement by State organs and other public entities in the national and county governments. According to the Constitution, when a State organ or any other public entity procures or contracts for goods or services, it is to do so in accordance with 'a system that is fair, equitable, transparent, competitive and cost-effective'.[10] The Constitution also mandates Parliament to enact legislation to prescribe a framework through which policies on public procurement of goods and services and asset disposal are to be implemented, including provisions on:

(a) categories of preference in the allocation of contracts;
(b) the protection or advancement of persons, categories of persons or groups previously disadvantaged by unfair competition or discrimination;
(c) ***sanctions against contractors that have not performed according to professionally regulated procedures, contractual agreements or legislation***; and
(d) sanctions against persons who have defaulted on their tax obligations, or have been guilty of corrupt practices or serious violations of fair employment laws and practices.[11]

Pursuant to article 227(2) of the Constitution, Parliament enacted the Public Procurement and Asset Disposal Act, 2015 (PPADA, 2015),[12] to give effect to article 227 of the Constitution and to provide procedures for efficient public procurement of goods and services and asset disposal by public entities.[13] Under the Act, public procurement is to be done in accordance with the guiding principles and values drawn from the Constitution and relevant statute, including:

[10] Constitution of Kenya, 2010, art 227(1).
[11] ibid art 227(2).
[12] Act No 33 of 2015, Laws of Kenya (assented to on 18 December 2015 and entered into force on 7 January 2016).
[13] PPADA, 2015, preamble.

(a) the national values and principles provided for under Article 10;
(b) the equality and freedom from discrimination provided for under Article 27;
(c) affirmative action programmes provided for under Articles 55 and 56;
(d) principles of integrity under the Leadership and Integrity Act, 2012 (No. 19 of 2012);
(e) the principles of public finance under Article 201;
(f) the values and principles of public service as provided for under Article 232;
(g) principles governing the procurement profession, international norms;
(h) maximisation of value for money;
(i) promotion of local industry, sustainable development and protection of the environment; and
(j) promotion of citizen contractors.[14]

The PPADA, 2015, which repealed the Public Procurement and Disposal Act, 2005,[15] was applied alongside the Public Procurement and Disposal Regulations, 2006[16] before the coming into force of the Public Procurement and Asset Disposal Regulations, 2020 (PPADR, 2020).[17] This article is a reaction to the PPADR, 2020, a subsidiary legislation made under PPADA, 2015. PPADR, 2020 was first published on 22 April 2020,[18] and later came in force on 2 July 2020.[19] Both PPADA, 2015 and PPADR, 2020 contain provisions on public procurement of consultancy services, which includes public procurement of legal services. This article looks into the dynamics of public procurement of legal services in Kenya, in view of the reality that the

[14] ibid, s 3.
[15] Act No 3 of 2005, Laws of Kenya (repealed); see PPADA, 2015, s 182.
[16] Legal Notice No 174 of 2006 (revoked).
[17] Legal Notice No 69. Regulation 224 of PPADR, 2020 revokes Legal Notice No 174 of 2006 through which the Public Procurement and Disposal Regulations, 2006 (PPADR, 2006) came into legal existence.
[18] Kenya Gazette Supplement No 53; Legislative Supplement No 37.
[19] Gazette Notice No 4957 of 2020, dated 9 July 2020, but published on 24 July 2020 (by the Cabinet Secretary for the National Treasury and Planning, Ukur Yatani) The Kenya Gazette, Vol. CXXII—No. 142.

legal profession is a self-regulating profession with internal professional laws, rules and regulations that dictate the extent and limits of legal practice in Kenya.

The article interrogates the unique features of the legal profession that have immense impact on public procurement of legal services and how that in turn affects the process, legislation, rules and regulations that pertain to public procurement generally. The aim is to assert the unique position regarding the procurement of legal services by public entities, and the need for the public procurement legal framework, under PPADA, 2015 and PPADR, 2020, and procuring public entities to accommodate the unique tenets of the legal profession in the public procurement process.

Consequently, the article makes a number of arguments as concerns public procurement of legal services. One, legal professionals, that is, advocates, should not participate in any bidding process relating to public procurement for legal services, including the price competition that comes with it. Two, legal services providers should not be selected on the basis of fees to be charged for the intended legal services because at the end of the day the charging of legal fees follows the Advocates Act, the Advocates (Remuneration) Order, the Advocates (Practice) Rules, and the Advocates (Marketing and Advertising) Rules. Three, the public entity seeking legal services should choose from a list of pre-selected legal services providers (that is, a list of law firms) on its roster, paying attention to expertise, fairness, rotation, and professional skills.[20] This means that the pre-qualification procedure to obtain a roster of law firms that can be engaged by the public entity from time to time is in itself sufficient in the public procurement of legal services, hence no further need for a bidding process.

II. General Framework on Public Procurement of Consultancy Services

PPADA, 2015 sets the rules and principles on procurement of goods and services and disposal of assets by State organs and public entities.[21] Under the Act, public entities include:

[20] Sections 57 and 71 of PPADA, 2015 make provision for the keeping of lists of registered (and the registration thereof) of suppliers, contractors and consultants by procuring public entities, according to their procurement needs.
[21] See PPADA, 2015, s 53(1).

(a) the national government or any organ or department of the national government;
(b) a county government or any organ or department of a county government;
(c) the Judiciary and the courts;
(d) the Commissions established under the Constitution;
(e) the ndependent Offices established under the Constitution;
(f) a state corporation within the meaning of the State Corporations Act (Cap 446);
(g) the Central Bank of Kenya established under the Constitution;
(h) a public school within the meaning of the Basic Education Act, 2013 (Act No 14 of 2013);
(i) a public university within the meaning of the Universities Act, 2012 (Act No 42 of 2012);
(j) a city or urban area established under the Urban Areas and Cities Act, 2011 (Act No 13 of 2011);
(k) a company owned by a public entity;
(l) a county service delivery coordination unit under the National Government Co-ordination Act, 2013 (Act No 1 of 2013);
(m) a constituency established under the Constitution;
(n) a Kenyan diplomatic mission under the state department responsible for foreign affairs;
(o) a pension fund for a public entity;
(p) a body that uses public assets in any form of contractual undertaking including public private partnership;
(q) a body in which the national or county government has controlling interest;
(r) a college or other educational institution maintained or assisted out of public funds;
(s) an entity prescribed as a public entity for the purpose of this paragraph; or
(t) any other entity or a prescribed class of public entities or particular public entities that uses public money for purposes of procurement or any other entity as declared

under sections 4 and 5 of the Public Finance Management Act, 2012 (No 18 of 2012).

The PPADR, 2020, like any other subsidiary legislation, compliments and gives practical effect to the provisions of PPADA, 2015. **Part X in both PPADA, 2015 and PPADR, 2020** provide for procurement of consultancy services. Section 2 of PPADA, 2015 defines *'consultancy services'* to mean *'services of predominantly an intellectual, technical or advisory nature, and includes services offered by all professionals'* In addition, the section defines a *'professional'* as *'a person who has professional qualifications in a specialized field and who is engaged in the practice of a skill or trade, having undertaken the relevant formal academic and professional training including undertaking practical learning in the form of apprenticeship or tutelage under the guidance of a suitably qualified and experienced person in the field of training or tutelage.'* The public procurement of consultancy services, therefore, entails the procurement of professional services by public entities.

It is not in doubt that advocates are professionals, learned professionals to be precise. The academic and professional qualifications for one to be admitted as an advocate of the High Court of Kenya are well engrained under part IV of the Advocates Act, and consist of a combination one having to pass university examinations towards the conferment of a university degree in law, having to undergo professional training and passing professional examinations administered by the Council of Legal Education in Kenya, and having to undertake practical learning termed pupillage under a practicing advocate of not less than five years in law practice.[22] The public procurement of consultancy services, therefore, also entails the procurement of the legal services of legal professionals, that is, advocates.

The rules, principles and regulations on public procurement drawn from PPADA, 2015 and PPADR, 2020 include those that pertain to pre-qualification procedure, pre-qualification documents and approval of pre-qualified candidates. The general procedure for procurement of consultancy services encompasses the registration of suppliers and the maintenance of a

[22] See sections 12-15 of the Advocates Act, Cap 16. See also part III (sections 9-11) of the Act as concerns the right to practice as an advocate.

list of registered suppliers by procuring public entities,[23] a pre-qualification process,[24] and/or an invitation of tenders or request for proposals from potential services providers,[25] followed by a bidding process.

A. List of Registered Suppliers

PPADA, 2015 allows for the registration of suppliers and for the maintenance of a list of registered suppliers by procuring public entities. Under the Act, registration of suppliers refers to;

> [T]he process of identifying and obtaining a list of prospective providers of a specified category of goods, works or services by a procuring entity for a specified period of time but not exceeding more than two years, and maintaining them for the purpose of inviting them on rotational basis for subsequent tendering proceedings such as request for quotations or restricted tendering, that may arise during the period of listing.[26]

Section 57 of PPADA, 2015 allows a public entity to keep a list of registered suppliers. The person in charge of procurement in a procuring public entity is to maintain and update lists of registered suppliers, contractors and consultants in the categories of goods, works or services, per its procurement needs.[27] The names of prospective suppliers of goods, works or services are to be submitted on a continuous basis and the list of registered suppliers is to be updated periodically as provided in PPADA, 2015 and PPADR, 2020.

Registration of suppliers is to be done in accordance with section 71 of PPADA, 2015. An application to be included in the list of the registered suppliers of a procuring entity may be made at any time and at no cost. The application must contain *proof of eligibility criteria* as provided in PPADA,

[23] See PPADA, 2015 ss 2, 57 and 71 regarding registration of suppliers and lists of registered suppliers.
[24] See ibid ss 2, 93, 94 and 95 regarding pre-qualification procedure, pre-qualification documents and approval of pre-qualified candidates.
[25]See ibid ss 2, 74, 118, and 123 regarding tenders, invitation to tender, request for proposals inviting expression of interest, and request for proposals to qualified persons, as concerns consultancy services.
[26] ibid s 2.
[27] See also ibid s 71(1).

2015, and *proof of capability criteria* comprising necessary qualifications, experience, resources, equipment and facilities to provide what is being procured.[28] The lists of registered suppliers are applied on the alternative procurement methods, other than open tendering, as specified and appropriate and the list will: be generated through portal, websites and people submitting hard copies of their intention to supply; allow for continuous applications and hence updating; be evaluated leading to registration on a bi-annual basis; be generated through market knowledge and survey; and be as may be prescribed.[29]

B. Pre-qualification process

Pre-qualification refers to the procedure used to identify and shortlist tenderers that are qualified, before invitation for tenders.[30] Pre-qualification procedure is thus a procedure whereby candidates are invited to demonstrate their qualifications prior to, and as a condition for, being invited to tender or submit proposals.[31] Pre-qualification procedure—used for complex and specialized goods, works and services whose procurement entails complex and specialized contracts with terms and conditions that are different from those in standard commercial contracts—is provided for under section 93 of PPADA, 2015.

An accounting officer of a procuring public entity may conduct a pre-qualification procedure as a basic procedure, prior to adopting an alternative procurement method other than open tender, for the purpose of identifying the best few qualified firms for the subject procurement.[32] The accounting officer is to publish an **invitation notice** to candidates to submit applications to be pre-qualified.[33] The invitation notice will include:

(a) the name, address and contact details of the procuring entity;
(b) outline of the procurement requirement, including the nature and quantity of goods, works or services and the

[28] ibid s 71(2).
[29] ibid s 71(4).
[30] ibid s 2.
[31] ibid.
[32] ibid s 93(1).
[33] ibid s 93(3).

location and timetable for delivery or performance of the contract;

(c) statement of the key requirements and criteria to pre-qualify;

(d) instructions on obtaining the pre-qualification documents, including any price payable and the language of the documents; and

(e) instructions on the location and deadline for submission of applications to pre-qualify;

(f) applicable preferences and reservations or any conditions arising from the related policy;

(g) declaration that it is open to bidders who meet the eligibility criteria; and

(h) requirement that only bidders with capacity to perform can apply.[34]

An accounting officer of a procuring public entity is to issue pre-qualification documents to all candidates upon request and maintain a record of all candidates issued with the documents.[35] The pre-qualification document must contain all the information necessary for the potential candidates to prepare and submit applications to be pre-qualified.[36] Such information include all that information already highlighted in section 93 above plus: instructions on the preparation of applications to pre-qualify, including any standard forms to be submitted and the documentary evidence and information required from candidates; instructions on the sealing, labelling and submission of applications to pre-qualify; and information on how applications will be evaluated.[37] The candidates should be allowed at least fourteen days to prepare and submit their applications to be pre-qualified.[38] Moreover, the accounting officer of a procuring public entity must promptly provide clarification on the pre-qualification document upon requests made before the deadline for submission.[39]

[34] ibid s 93(4).
[35] ibid s 94(1).
[36] ibid s 94(2).
[37] ibid s 94(3).
[38] ibid s 94(4).
[39] ibid s 94(5)

Following the evaluation of the applications for pre-qualification, the evaluation committee must record, in writing, the results of its evaluation of the applications using the evaluation criteria in the pre-qualification documents, and must state which candidates were found to be qualified and the reasons why any candidates were not qualified.[40] The record of the evaluation results must be submitted with recommendations of the evaluation committee and the professional opinion of the head of procurement function to the accounting officer for approval.[41] Thereafter, a procuring public entity must invite tenders from only the approved candidates who have been pre-qualified and must notify every candidate who submitted an application for pre-qualification but did not qualify.[42]

C. Request for Proposals

Under section 116 of PPADA, 2015, request for proposals (RFP) as a procurement method is used when procuring consultancy services or a combination of goods and services. Besides, RFP may be used in combination with other procurement methods. An accounting officer of a procuring public entity may invite RFPs or expressions of interest (EOI) through advertisement in the dedicated government's advertising tenders' portal, its own website, or in at least one daily newspaper of county-wide circulation.[43] The accounting officer may also utilize the list of registered suppliers generated under section 57 of PPADA, 2015, highlighted above.[44]

The notice inviting interested persons to submit EOI will set out: the name and address of the procuring public entity; a brief description of the consultancy services being procured and, where necessary, the goods being procured; eligibility and the qualifications necessary to be invited to submit a proposal; and an explanation of where and when EOI will be submitted.[45] The accounting officer of a procuring public entity will evaluate the EOI using the evaluation criteria in the EOI notice and documents and record, in writing, the results of its evaluation, and shall state which candidates were found to be

[40] ibid s 95(1)
[41] ibid s 95(2)
[42] ibid s 95(3) and (4).
[43] ibid s 118(1) and 119(3) and (4).
[44] ibid s 118(1).
[45] ibid s 119(1).

qualified and the reasons why any candidates were not qualified.[46] It is noteworthy that, *for purposes of evaluation of EOI for professional services, regard is to be hard to the provisions of PPADA, 2015 and the statutory instruments issued by the relevant professional associations in relation to the regulation of fees chargeable for services rendered*.[47]

Following an evaluation of the EOI, a minimum of six will be shortlisted, but a minimum of three will be shortlisted where less than six were received.[48] The results of the evaluation will be submitted to the accounting officer for review and approval.[49] The accounting officer will invite proposals from only those persons who have been shortlisted as qualified to submit their tenders within a specified period.[50] Each of the persons who are shortlisted will be issued with a RFP setting out:[51]

(a) the name and address of the accounting officer of the procuring entity;
(b) the general and specific conditions to which the contract will be subject;
(c) instructions for the preparation and submission of proposals which may require that a proposal include a technical proposal and a financial proposal as prescribed;
(d) an explanation of where and when proposals shall be submitted;
(e) the procedures and criteria to be used to evaluate and compare the proposals including—

    (i) the procedures and criteria for evaluating the technical proposals which shall include a determination of whether the proposal is responsive;
    (ii) the procedures and criteria for evaluating the financial proposals; and

[46] ibid s 121(1).
[47] ibid s 121(2).
[48] ibid s 121(3).
[49] ibid s 121(4).
[50] ibid ss 118(2) and 122.
[51] ibid s 123.

(iii) any other additional method of evaluation, which may include interviews or presentations, and the procedures and criteria for that additional method;

(f) a statement giving notice of the restriction in section 130 on entering into related contracts; and

(g) anything else required, under PPADA, 2015 or PPADR, 2020 to be set out in the RFP.

The evaluation and selection of proposals for the provision of consultancy services may be done through a number of selection procedures or methods, which are:[52]

(a) Quality-Based Selection (QBS), which focuses on quality and selects the highest quality technical proposal;

(b) Least-Cost Selection (LCS), which selects the lowest priced financial proposal among the firms which passed the technical evaluation;

(c) Quality-and-Cost-Based Selection (QCBS) method which requires the participants to submit a technical and a financial proposal at the same time, but in separate envelopes, and then uses a competitive process that takes into account the quality of the proposal (technical proposal) and the cost of the services (financial proposal) in selecting the successful firm;

(d) Consultants' Qualifications Selection (CQS);

(e) Individual Consultants' Selection (ICS);

(f) Fixed Budget Selection (FBS); or

(g) Single Source Selection (SSS).

QBS method is used for: complex or highly specialized assignments for which it is difficult to define precise terms of reference (TORs) and the required input from the consultants; assignments that have a high downstream impact and in which the objective is to have the best experts; assignments that can be carried out in substantially different ways; assignments and professional services which are regulated by Acts of Parliament which stipulate fees and charges

[52] ibid s 124.

applicable for such assignments.[53] On the other hand, **LCS method** is used in selecting consultants for assignments of a standard or routine nature where well-established practices and standards exist.[54]

CQS method is used when the nature and complexity of the project does not require the issuance of RFPs nor is there justification to evaluate competitive proposals. The selection of a consultant proceeds by way of Request for Expressions of Interest (REIO), Instructions to Consultants (ITC) and TORs and thereafter a request for the selected consultant to submit a technical and financial proposal before negotiations of the contract for engagement ensue. **ICS method** proceeds through a Letter of Invitation (LOI), ITC and TORs followed by the submission of technical and financial proposals before negotiation of the consultant engagement contract. ICS method is used to select individual consultants regulated by professional associations.

FBS method indicates the available budget and requests consultants to provide their best technical and financial proposals (within the budget) in separate envelopes, hence is appropriate only when the assignment is simple and can be precisely defined and when the budget is fixed.[55] In FBS method, financial proposals that exceed the indicated budget are rejected and the consultant who has submitted the highest ranked technical proposal among financial proposals within the budget are selected and invited to negotiate a contract.[56]

SSS method is used only if it presents a clear advantage over competition, in cases: where there is evidence that goods, works or services are available only from a particular supplier, or a particular supplier has exclusive rights in respect of the consultancy services, and no reasonable alternative or substitute exists; or for tasks that represent a natural continuation of previous work carried out by the firm; and in exceptional cases, such as, but not limited to, in response to natural disasters and for a declared national emergency situations.[57] The accounting officer of a procuring entity must justify the use

[53] ibid s 124(7).
[54] ibid s 124(8).
[55] ibid s 124(9)-(10).
[56] ibid s 124(11).
[57] ibid s 124(12).

of the Single Source Selection method in the context of the overall interests of the procuring public entity.[58] Moreover, the intention to single source must be advertised and all interested suppliers who respond will be invited to submit proposals.[59]

QCBS method is the preferred method for evaluating and selecting successful firms for purposes of public procurement of consultancy services, while the rest are alternative selection methods and must be reported to the Public Procurement Regulatory Authority and approved accordingly before being used.[60] In any case, the method to be used in the evaluation and selection of the successful firms, plus the estimated budget or estimated time for completing the project, must be stated in the request for proposals.[61]

Following the evaluations, the successful proposal will be the responsive proposal with the highest score determined by an accounting officer per the procedure and criteria under section 86 of PPADA, 2015 on successful tenders.[62] Thereafter, contractual negotiations will be undertaken between the procuring public entity and the successful RFP tenderer.[63]

D. Invitation of Tenders

A tender is an offer in writing for the supply of goods, services or works at a price, following an invitation to tender, request for quotation,[64] or request for

[58] ibid s 124(13).
[59] ibid s 124(14).
[60] ibid ss 124(1), (6) and (15).
[61] ibid ss 124 and 125.
[62] ibid s 127.
[63] ibid ss 128 and 129.
[64] See ibid ss 105 and 106. (Request for quotations method of public procurement is normally used alongside the list of the registered suppliers prepared under section 57 of PPADA, highlighted above. A procuring public entity will issue a request for quotations if: the estimated value of the goods, works or non-consultancy services being procured is less than or equal to the prescribed maximum value for using requests for quotations as prescribed in the Regulations; the procurement is for goods, works or non-consultancy services that are readily available in the market; and the procurement is for goods, works or services for which there is an established market. Request for quotations is a very competitive process and the successful quotation will be the quotation with the lowest price that meets the requirements set out in the request for quotations.)

proposal by a procuring entity.[65] Under section 74 of PPADA, 2015, the accounting officer of the procuring public entity will prepare **an invitation to tender** that sets out the following;

(a) the name and address of the procuring entity;
(b) the tender number assigned to the procurement proceedings by the procuring entity;
(c) a brief description of the goods, works or services being procured including the time limit for delivery or completion;
(d) an explanation of how to obtain the tender documents, including the amount of any fee, if any;
(e) an explanation of where and when tenders shall be submitted and where and when the tenders shall be opened;
(f) a statement that those submitting tenders or their representatives may attend the opening of tenders;
(g) applicable preferences and reservations pursuant to the PPADA, 2015;
(h) a declaration that the tender is only open to those who meet the eligibility requirements;
(i) requirement of serialisation of pages by the bidder for each bid submitted; and
(j) any other requirement as may be prescribed.

Thereafter, all tender documents must be sent out to eligible bidders by recorded delivery.[66]

E. The bidding Process

The bidding process is mostly a price competition by the suppliers of goods, works, or services—in this case the supply of professional services, although other factors also play a major role in determining which service provider is ultimately selected, such as the expertise of the potential consultants.[67] The evaluation and comparison of received tenders is to be done using the

[65] See ibid ss 2 and 70.
[66] ibid s 74(2).
[67] ibid s 80.

procedures and criteria set out in the tender documents. However, evaluation and comparison of tenders for professional services must have regard to the provisions of the statutory instruments issued by the relevant professional associations regarding regulation of fees chargeable for services rendered, alongside the provisions of PPADA, 2015.[68]

Following the evaluation and comparison of tenders, the public procurement contract will be awarded to the successful tenderer.[69] Under section 86 of PPADA, 2015, the successful tender will be the one that meets any of the following, as specified in the tender document:

(a) the tender with the *lowest evaluated price*;
(b) the responsive proposal with the highest score determined by the procuring entity by combining, for each proposal, in accordance with the procedures and criteria set out in the RFP, the scores assigned to the technical and financial proposals where the RFP method is used;
(c) the tender with the *lowest evaluated total cost of ownership*; or
(d) the tender with the highest technical score, where a tender is to be evaluated based on procedures regulated by an Act of Parliament which provides guidelines for arriving at *applicable professional charges*.

Nonetheless, to be eligible to bid for a public procurement contract, one must meet the following requirements:

(a) the person has the legal capacity to enter into a procurement contract;
(b) the person is not insolvent, in receivership, bankrupt or in the process of being wound up;
(c) the person, if a member of a regulated profession, has satisfied all the professional requirements;

[68] ibid s 80(2).
[69] ibid s 85.

(d) the procuring entity is not precluded from entering into the contract with the person under section 38 of PPADA, 2015;
(e) the person and his or her sub-contractor, if any, is not debarred from participating in procurement proceedings under Part IV of this Act;
(f) the person has fulfilled tax obligations;
(g) the person has not been convicted of corrupt or fraudulent practices; and
(h) is not guilty of any serious violation of fair employment laws and practices.[70]

III.The Special Exception in Public Procurement of Legal Services

Special exceptions are imperative in the public procurement of legal services because the legal profession is a self-regulating profession. The practice of law in Kenya is regulated by the Advocates Act[71] and the Law Society of Kenya Act, 2014,[72] and the rules, orders and regulations made thereunder. The workings of the legal profession as pertains to the means and methods of obtaining clients and the charging and receiving of fees for the provision of legal services by advocates is specifically governed by the Advocates Act, and its subsidiary legislation, the Advocates (Remuneration) Order, 1962, the Advocates (Practice) Rules, 1966, and the Advocates (Marketing and Advertising) Rules, 2014.

A. The Advocates Act

Part IX of the Advocates Act[73] entails provisions on the remuneration of advocates for legal services rendered. The Act allows for the drawing of legal services agreements, including an agreement on fees, as between the advocate and his or her client. However, the contents and the extent of a legal services agreement can only be determined when the advocate is aware of the claim and its nature and complexity. Without information on the nature of the particular claim in which the professional services of the advocate are required, the likelihood of contravention of the Act is very high. For instance,

[70] ibid s 55.
[71] Cap 16, Laws of Kenya.
[72] Act No 21 of 2014, Laws of Kenya.
[73] Advocates Act, ss 44-52.

a number of factors determine how much remuneration is due to the advocate, including the position of the party whom the advocate is to represent (whether they are plaintiffs or defendants etc.), the unique circumstances of the claim, the value of the subject matter involved, the skill, labour and responsibility required of the advocate, and the number and importance of the documents to be prepared or perused.[74]

An advocate may enter into **a legal services agreement** with the client as provided under section 45(1) of the Advocates Act, in that the advocate may;

> (a) before, after or in the course of any contentious business, make an agreement fixing the amount of the advocate's remuneration in respect thereof;
> (b) before, after or in the course of any contentious business in a civil court, make an agreement fixing the amount of the advocate's instruction fee in respect thereof or his fees for appearing in court or both;
> (c) before, after or in the course of any proceedings in a criminal court or a court martial, make an agreement fixing the amount of the advocate's fee for the conduct thereof,

A legal services agreement will be valid and binding on the parties, the advocate and his or her client, if it is in writing and is signed by the client or his agent duly authorized in that behalf. Even so, section 46 of the Advocates Act forbids advocates from entering into certain agreements with their clients and even goes ahead to invalidate such agreements. Such invalid agreements include any agreement where an advocate states that payment or remuneration rates for legal services rendered will be dependent on the success or failure of the underlying suit or proceedings, or that remuneration will be less than that prescribed in the Advocates (Remuneration) Order. In particular, section 36 of the Advocates Act expressly forbids advocates from **undercutting,** by charging remuneration below that which is prescribed under the Advocates (Remuneration) Order, and stipulates that;

[74] See e.g., ibid s 44(2) as concerns some of the considerations in remunerating advocates in non-contentious matters.

> (1) Any advocate who holds himself out or allows himself to be held out, directly or indirectly and whether or not by name, as being prepared to do professional business at less than the remuneration prescribed, by order, under this Act shall be guilty of an offence.
> (2) No advocate shall charge or accept, otherwise than in part payment, any fee or other consideration in respect of professional business which is less than the remuneration prescribed, by order, under this Act.[75]

Further, section 38 of the Advocates Act frowns upon **soliciting or touting for legal services** and provides that:

> (1) Any unqualified person who, in consideration of any payment or other advantage to himself or any other person, procures or attempts to procure the employment of an advocate as such in any suit or matter or solicits from an advocate any such payment or advantage in consideration of such employment shall be deemed to be a tout for the purposes of this section.
> (2) The Chief Justice may, if satisfied that any person has acted as a tout, by order exclude such person from the employment by an advocate in his practice as such.

Whether or not there is a written legal services agreement or agreement on fees, the Advocates (Remuneration) Order sets the **minimum fees** to be charged for the provision of a variety of legal services by the advocates. Advocates are restricted from charging fees below the minimum fees set out under the Advocates (Remuneration) Order. Beyond the minimum fees set out under the Advocates (Remuneration) Order, the legal fees charged are determined by the value of the subject matter involved, the complexity of the legal issues involved, the length of litigation, the Court in which the litigation is taking place (from the subordinate courts to the superior courts), and the expertise and particular skill-set of the advocate. Also, a Senior Counsel charges higher fees in comparison to an advocate who is not a Senior Counsel.

[75] See also Advocates (Remuneration) Order, 1962, r 3.

Moreover, where there is a disagreement on legal fees as between the advocate and his or her client, the advocate is required to draw a **bill of costs** for purposes of taxation, being guided by the Advocates (Remuneration) Order, and to present the bill of costs to the taxing officer to be taxed accordingly.[76] The client may equally initiate the taxation process if dissatisfied with the legal fees charged by an advocate. Otherwise, the client is allowed to respond to the advocate's bill of costs and participate in the taxation proceedings. The ultimate costs of the legal services rendered by the advocate is determined by the taxing officer through a discretionary process.[77]

B. The Advocates Remuneration Order

The Advocates (Remuneration) Order, 1962 sets out the minimum fees that an advocate can charge and receive for legal services rendered, whether in contentious or non-contentious matters, and the taxation of costs as between the advocate and the client.[78] As already indicated above, an advocate cannot agree to or accept his remuneration at less than that provided by the Advocates (Remuneration) Order.[79] In addition, an advocate may charge and receive additional remuneration for any business that requires and receives exceptional dispatch, or is attended to outside normal business hours at the client's request, and as agreed between the client and the advocate.[80]

Moreover, the Advocates (Remuneration) Order entitles an advocate to charge and receive a further special fee in case of a business of exceptional importance or unusual complexity, which may be brought about by factors such as: the place at or the circumstances in which the business, or part it, is transacted; the nature and extent of the pecuniary or other interest involved;

[76] ibid r 13.

[77] ibid r 16 of the Advocates (On every taxation, the taxing officer may allow all such costs, charges and expenses, as authorized in the Order, as shall appear to him or her to have been necessary or proper for the attainment of justice or for defending the rights of any party. However, no costs shall be allowed which appear to the taxing officer to have been incurred or increased through overcaution, negligence or mistake, or by payment of special charges or expenses to witnesses or other persons, or by other unusual expenses.)

[78] Advocates (Remuneration) Order, r 13(1).

[79] ibid r 3.

[80] ibid r 4.

the skill, labour and responsibility entailed; and the number, complexity and importance of the documents prepared or examined.[81]

C. The Advocates Practice Rules

The Advocates (Practice) Rules, 1966 forbid advocates from charging fees in contravention of the Advocates (Remuneration) Order and from engaging in unfair business practices in order to obtain clients. No advocate may directly or indirectly apply for or seek instructions for professional business, or do or permit in the carrying on of his practice any act or thing which can be reasonably regarded as touting or advertising or as calculated to attract business unfairly.[82] Further, no advocate may hold himself out of or allow himself to be held out directly or indirectly and whether or not by name as being prepared to do professional business at less than the remuneration scales laid down by the Advocates (Remuneration) Order.[83]

D. The Advocates Marketing and Advertising Rules

The Advocates (Marketing and Advertising) Rules, 2014 set limits on the means and methods that an advocate can employ to obtain clients for their law practice. An advocate cannot unfairly apply for or seek instructions for professional business, nor do or permit to be done in the advocate's name anything that may reasonably be considered as calculated to unfairly attract professional business.[84] In essence, an advocate cannot advertise his law practice other than as prescribed in the Advocates (Marketing and Advertising) Rules.[85] For example, when advertising his or her law practice, an advocate cannot include information that constitutes, *'a promise by the advocate or the advocate's firm to achieve a particular outcome for clients or prospective clients of the advocate or the advocate's firm or that failure to obtain that outcome shall constitute a waiver of the advocate's or the advocate's firm's legal fees'*.[86] Accordingly, an advocate commits professional misconduct when the advocate, or the advocate's firm uses an intermediary to solicit professional business, or makes false or misleading

[81] ibid, r 5.
[82] Advocates (Practice) Rules, 1966, r 2.
[83] ibid r 3.
[84] Advocates (Marketing and Advertising) Rules, 2014, r 2.
[85] ibid r 3.
[86] ibid rule 5(2)(d).

statements in an advertisement to solicit professional business, or refuses to comply with the Advocates (Marketing and Advertising) Rules.[87]

E. Thiong'o Njiri & 81 others v The Municipal Council of Kiambu & another[88]

In *Thiong'o Njiri & 81 others v The Municipal Council of Kiambu & another*, Justice Kalpana Rawal (as she then was, but now retired Supreme Court Justice and Deputy Chief Justice of the Republic of Kenya) considered the issue of public procurement of legal services under the then Public Procurement and Disposal Act, 2005 (PPDA, 2005) in relation to the Advocates Act. The Honourable Judge concluded that **inviting a bid for legal services goes against the spirit and purport of the Advocates Act.** The Honourable Judge expressed herself in the manner that:

> It cannot be denied that the Advocates are occupying a special position amongst the professionals and are guided strictly by the very elaborate provisions of the Advocates Act, Orders and Rules made under the Act as well as the Law Society Act. Due to the position held by the Advocates, they have been placed under stringent conditions as regards legal charges and manner in which they are restricted to advertise or compete with other co-Advocates. The Advocates Act thus is a specific Act governing the practice of the Bar. As against those provisions, the plaintiffs are relying on the provisions of Act [PPDA, 2005] which stipulates the process of procurement before any goods, works or services are procured, by a public entity. In my view, the Act is a general Act unlike the Advocates Act.[89]

The Honourable Judge elaborated further on justifications for excluding the public procurement of legal services from the general public procurement process for consultancy services under the then PPDA, 2005 and stated thus;

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[87] ibid r 10(a), (c) and (d).
[88] [2011] eKLR, HC (Nairobi) Civ Suit No 499 of 2010 (ruling).
[89] Thiong'o Njiri & 81 others v The Municipal Council of Kiambu & another [2011] eKLR, p 5.

> In my considered view, the inclusion of service of an Advocate to be procured by advertising and the procurement process could and does involve the breach of the provisions of the Advocates Act, the Advocates [Remuneration] Order as well as Advocates (Practice) Rules. I do wonder how an Advocate could bid to tender for legal service simpliciter. How an Advocate could place the economic provision for legal services in the tender without the claim, value or nature of claim being specified. The legal charges shall vary according to each and every case which the local authorities might file or defend. Inviting to bid for legal services per se could contravene the spirit and purport of the Advocates Act which is a specific Act and prior in time. If the local authority needs the services for a specified case, the insistence of undergoing procurement process shall be self-defeating due to the court procedure. The invocation of the procurement process under the Act would be clearly impractical and, if I may state, unethical so far as legal profession is concerned. Sec. 5 of the Act [PPDA, 2005] (…) in my view, has no relevance to the issue before me. There is no conflict between the purport spirit and purpose of the two Acts considering the nature of the legal services to be rendered even to a public entity. I do find that the Act [PPDA, 2005] thus does not apply to the Advocates.[90]

The views of the retired Supreme Court Justice and Deputy Chief Justice, Kalpana Rawal stand true as concerns the public procurement of legal services. Inviting bids for public (or even private) procurement of legal services goes against the spirit, tenet and purport of the Advocates Act and its relevant subsidiary legislation. It would be an illegality and professional misconduct for an advocate to purport to quote the price for legal services to be provided without knowledge of the claim nor the value of the claim for which the legal services are sought.

As a consequence, if the foregoing legal provisions (under the Advocates Act, the Advocates (Remuneration) Order, the Advocates (Practice) Rules, and the

[90] ibid.

Advocates (Marketing and Advertising) Rules, and as interpreted in *Thiong'o Njiri & 81 others v The Municipal Council of Kiambu & another*) are applied to the public procurement process, the special exceptions in the public procurement of legal services would entail that:

(a) Advocates or law firms would not participate in any bidding process relating to public procurement for legal services, especially where price competition is involved;
(b) Advocates or law firms would not be selected on the basis of fees to be charged for the legal services sought because the charging of legal fees follows the Advocates Act, the Advocates (Remuneration) Order, the Advocates (Practice) Rules, and the Advocates (Marketing and Advertising) Rules;
(c) The pre-qualification procedure or registration process to obtain a roster of law firms or advocates that can be engaged by a procuring public entity in the provision of the needed legal services would be sufficient in itself, hence no further need for a bidding process;[91] and
(d) The procuring public entities seeking legal services would instead have to choose from a list of pre-selected legal services providers (that is, a list of law firms or advocates) on its roster, paying attention to expertise, fairness, rotation, and professional skills, and not the fees to be charged.[92]

The PPADA, 2015 generally acknowledges the unique position involving the public procurement of professional services. Section 5(1) of the Act, in addressing situations where the provisions of the PPADA, 2015 come into conflict with those of other Acts, provides that;

> This Act shall prevail in case of any inconsistency between this Act and any other legislation or government notices or circulars,

[91] See sections 93, 94 and 95 of PPADA, 2015 on pre-qualification procedure, pre-qualification documents and approval of pre-qualified candidates.
[92] See section 57 and 71 of PPADA, 2015 regarding the registration of suppliers and the maintenance of a list of registered suppliers by procuring public entities.

> in matters relating to procurement and asset disposal *except in cases where procurement of professional services is governed by an Act of Parliament applicable for such services*.

In addition, as concerns the professional fees to be charged for consultancy services provided to public entities, section 80(2) of the PPADA, 2015 provides that the evaluation and comparison of responsive tenders in that regard is to be done using the procedures and criteria set out in the tender documents, but in the case of a tender for professional services, the evaluation and comparison is to have regard to the provisions of the PPADA, 2015 and *statutory instruments issued by the relevant professional associations regarding regulation of fees chargeable for services rendered.* Regulation 81 of the PPADR, 2020 is on board in that regard too as it stipulates that *the professional fees and rates chargeable under section 80(2) of the PPADA, 2015 are to be guided by the rates approved by the respective professional bodies.*

That said, the supremacy of the Advocates Act and its relevant subsidiary legislation, including the Advocates (Remuneration) Order, Advocates (Practice) Rules, and the Advocates (Marketing and Advertising) Rules, in the public procurement of legal services cannot be ignored.

IV. Conclusion

In view of the specific tenets of the legal profession embodied under sections 36, 38, 44, 45 and 46(1)(d) of the Advocates Act and its subsidiary legislation, the Advocates (Remuneration) Order, the Advocates (Practice) Rules, and the Advocates (Marketing and Advertising) Rules, as concerns the remuneration of advocates and the means and methods to be employed by advocates in order to obtain clients, **a pre-qualification procedure or registration process to produce a list of participating legal services providers (a roster of law firms or advocates) for any procuring public entity would be sufficient in itself**. Such pre-qualification procedure or registration process should be limited to factors such as expertise and professional skills, in terms of law practice areas of the law firms or advocates, in order to create a roster of participating law firms. Thereafter, law firms should be selected from the roster on rotational and fairness basis, but not on the basis of price quotations.

In essence, legal professionals (that is, advocates) should not participate in a bidding process and the price competition that comes with it. Legal services providers should not be selected on the basis of fees to be charged for the legal services to be rendered as the charging of legal fees and the provision of legal services by advocates, follows the Advocates Act, the Advocates (Remuneration) Order, the Advocates (Practice) Rules, and the Advocates (Marketing and Advertising) Rules. Otherwise, participating law firms may be subjected to or even find themselves engaging in illegality and professional misconduct by undercutting legal fees and soliciting and touting in order to win in the tender bidding process.

The legal framework for the public procurement of consultancy services in Kenya, under PPADA, 2015 and PPADR, 2020, and the procuring public entities should therefore be aware of and take into consideration the tenets of the legal profession that demand special exceptions in the public procurement of legal services. As a result, it is imperative that express exemptions of legal services providers from the normal tender bidding process, that is done on cost basis and promises and actions that go against the Advocates Act, the Advocates (Remuneration) Order, the Advocates (Practice) Rules, and the Advocates (Marketing and Advertising) Rules, are put in place and adhered to.

Adopting Information Technology in the Legal Profession in Kenya as a Tool of Access to Justice

By: James Ndungu Njuguna [*]

Abstract

The paper critically discusses the role of Information Technology in the legal profession in Kenya. It presents a case for the adoption of IT in the legal profession as a tool of access to justice. In the wake of the challenges caused by the COVID-19 pandemic, the paper argues that the legal profession which has hitherto been conservative in nature can longer continue to shun technology. Technology is increasingly taking centre stage in our social, political and economic lives and the legal profession risks being overtaken by events unless it embraces change. The paper discusses some of the successes and challenges faced in adopting IT in the legal profession in Kenya. It then suggests solutions aimed at enhanced adoption of IT in the legal profession in Kenya as a tool of access to justice.

1. Introduction

The legal profession is being fundamentally transformed by forces at work in the world.[1] This transformation is being driven by a riptide of 21st century social and economic trends, the ascendancy of information technology, the globalization of economic activity, the blurring of differences between professions and sectors and the increasing integration of knowledge.[2] At the centre of this transformation has been the adoption of Information and Communication technology.

Information and communication technology (ICT) is an umbrella term that covers all advanced technologies in manipulating and communicating

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[1] Kellogg Sarah, 'Cover Story: The Transformation of Legal Education' *From Washington Lawyer, May 2011* available at https://www.dcbar.org/bar-resources/publications/washington-lawyer/articles/may-2011-legal-education.cfm (accessed on 23/04/2021)

[2] Ibid

information.[3] The term is sometimes used in preference to information technology (IT), particularly in education and government. ICT and IT encompass all media, to record information (magnetic disk/tape, optical disks (CD/DVD), flash memory; technology for broadcasting information - radio, television; and technology for communicating through voice and sound or images - microphone, camera, loudspeaker, and telephone to cellular phones. It includes the wide varieties of computing hardware (PCs, servers, mainframes, networked storage).[4] ICT has been hailed as having the capability of promoting equality, empowering marginalised groups by providing accessible and affordable information and facilitating development.

Adoption of IT in the legal profession has often been faced by a myriad of challenges. Advocates have, often, lagged behind in adopting new technology due to the conservative nature of the legal profession. However, this is no longer tenable in this era of Information Technology. Emerging technologies bring with them substantial changes that threaten current social, political and economic orders and the often conservative legal profession is not immune. To this effect, it has been argued that:

> *….lawyers who are unwilling to change their working practices and extend their range of services will in the coming years struggle to survive. Meanwhile those who embrace new technologies and novel ways of sourcing legal work are likely to trade successfully for many years yet, even when they are not occupied with the law jobs that most law schools currently anticipate for their graduates.*[5]

The demand by corporate clients that lawyers update their systems to run equally and be compatible with the client's in-house system for ease in communication have seen increased interest among lawyers in the potential of

[3] Lubbe. S & Singh.S., From Conception to Demise: Implications for Users of Information Systems in Changing a Local Parastatal Educational Institution in KwaZulu-Natal, South Africa, available at https://www.igi-global.com/chapter/conception-demise-implications-users-information/21495 (accessed on 21/04/2021)

[4] Ibid

[5] Susskind. R., The End of Lawyers? Rethinking the Nature of Legal Services (Oxford University 2008)

ICT as a management tool in law firms especially among big law firms.[6] This has necessitated the adoption of information and communication technology (ICT) in handling legal matters and management of client affairs.[7]

The outbreak of the Coronavirus disease (COVID-19) pandemic has unsettled not only the global economy but also many professions and radically transformed their organization culture.[8] The legal practice in many parts of the world including Kenya has majorly been by way of physical attendance in courtrooms by judges and magistrates, advocates and witnesses for in person hearing of cases.[9] However, this is no longer tenable in the prevailing circumstances due to COVID 19 containment measures such as lockdowns and physical distancing. The need for adoption of IT in the legal profession has never been more urgent.

The paper thus seeks to critically discuss the adoption of legal technology in Kenya. Legal Technology (Legal Tech) has been defined as the use of technology and software to aid in the provision of legal services.[10] It discusses the progress made towards adoption of legal technology in Kenya and suggests reforms towards effective embracing of IT in the legal profession in Kenya.

2. Legal Framework on Legal Technology in Kenya

The Constitution of Kenya, 2010 enshrines the right of access to justice and mandates the state to ensure that this right is enjoyed by all persons.[11] Use of IT can enhance the right of access to justice by ensuring that citizens have

[6] Susskind, R. E. (1996), *The Future of Law: Facing the challenges of Information Technology*, 2nd ed., Oxford, Oxford University Press.
[7] Ibid
[8] Muigua. K., Legal Practice and New Frontiers: Embracing Technology for Enhanced Efficiency and Access to Justice, available at http://kmco.co.ke/wp-content/uploads/2020/06/Legal-Practice-and-New-Frontiers-Embracing-Technology-for-Enhanced-Efficiency-and-Access-to-Justice-Kariuki-Muigua-Ph.D-June-2020.pdf (accessed on 21/04/2021)
[9] Ibid
[10] What Is Legal Technology And How Is It Changing Our Industry?' (*The Lawyer Portal*, 29 January 2019) available at https://www.thelawyerportal.com/blog/what-is-legal-tech-and-how-is-it-changing-industry (accessed on 21/04/2021)
[11] Constitution of Kenya, 2010, Article 48, Government Printer, Nairobi.

increased access to information necessary for effective and efficient decision making on legal issues.[12]

The Judicial Service Act requires the Judiciary and the Judiciary Service Commission to apply modern technology in their operations.[13] The Act further requires the Judiciary in exercise of the powers or the performance of the functions conferred by the Act to have the technical competence to ensure that the requirements of the judicial process are fulfilled.[14]

The Magistrates' Courts Act allows the Chief Justice to make rules for the effective organization and administration of the Magistrates' Court.[15] Such rules may provide for *automation of Court records, case management, protection and sharing of Court information and the use of information communication technology*.[16]

3. Progress Made towards Adoption of it in the Legal Profession in Kenya

3.1 Virtual Court Sessions

The disruptive impact of the COVID 19 pandemic has forced the judiciary to enhance the uptake of IT to ensure that the wheels of justice continue rolling. On 15th March 2020, the Chief Justice of the Republic of Kenya announced a scale down of court activities throughout the country due to the concerns created by the outbreak of the pandemic.[17] Courts were seen possible hotspots for the spread of the pandemic owing to the large crowds of persons including advocates, court staff and litigants who are normally part of the day to day

[12] International Development Law Organisation: IDLO in Kenya: Access to Justice, available at https://www.idlo.int/idlo-kenya-access-justice (accessed on 21/04/2021)
[13] Judicial Service Act, No. 1 of 2011, S 3 (l), Government Printer, Nairobi.
[14] Ibid, S 4 (a)
[15] Magistrates' Courts Act, No. 26 of 2015, S 20 (1), Government Printer, Nairobi.
[16] Ibid
[17] Judiciary, 'Press Statement: Administrative and Contingency Management Plan to Mitigate COVID-19 in Kenya's Justice Sector' available at https://www.judiciary.go.ke/press-statement-administrative-and-contingency-management-plan-to-mitigate-covid-19-in-kenyas-justice-sector (accessed on 22/04/2021)

court operations.[18] The ensuing period has seen digital upscaling of court operations through measures such virtual hearings and video conferencing . The judiciary has also enhanced its electronic case management system through systems and processes including electronic case filing (e-filing); e-service of documents and electronic delivery of rulings and judgments.[19] Whereas these technologies have majorly been adopted as a result of COVID-19 pandemic, there is need for their continued use post COVID-19 in order to ensure efficient access to justice.

3.2 Access to Legal Information Through E-Systems

The legal profession has made progress towards ensuring access to legal information through electronic systems. The National Council for Law Reporting Act establishes the National Council for Law Reporting whose functions include inter alia preparation and publication of the reports to be known as the Kenya Law Reports, which shall contain judgments, rulings and opinions of the superior courts of record.[20] Pursuant to this mandate, the Council has developed a website known as Kenya Law through which it continuously provides legal information including judgments and rulings of superior courts under the theme 'where legal information is public knowledge.[21] The website also provides a full catalogue of the Laws of Kenya including Acts of Parliament, Treaties, Legal Notices, Practice Notes and Bills. The website further provides updates on day-to-day operations of courts and Tribunals in Kenya through cause lists posted daily. This has been a major step in enhancing access to legal information in Kenya through the use of technology.

Further, there has been emergence of online platforms providing consumers with legal information that was traditionally the preserve of lawyers in their physical law firms. These include the Uwakili.com which provides online legal services to businesses by enabling them create simple legal documents

[18] Ibid
[19]Kenya Law: Electronic Case Management Practice Directions, available at 2020'http://kenyalaw.org/kl/index.php?id=10211 (accessed on 22/04/2021)
[20] National Council For Law Reporting Act, No. 11 of 1994, S 3 (a)
[21] Kenya Law, http://kenyalaw.org/kl/, (accessed on 22/04/2021)

including wills, contracts and tenancy agreements.[22] Further, there are computer applications such as M-Sheria which offer legal services by SMS to clients thus enhancing access to justice.[23]

Law firms in Kenya have also made significant strides towards ensuring an online presence. Most firms have websites which provide basic information about them and the services they offer. Further, law firms have adopted electronic means of communication such as emails through which they communicate with each other and provide regular updates to clients.

3.3 Digitization and Automation of Legal Services

There has been progress towards digitization and automation of legal services in Kenya. The e-Citizen platform has resulted in automation of legal services that were once done exclusively by lawyers.[24] The platform provides access to services such as registration of businesses and companies which can be accessed by any person.[25]

Further, the Ministry of Lands has made attempts towards land registries across the country. In its report the Ministry pointed out to poor land records management and observed that it had accumulated massive land information records dating back to over 100 years and further that the current system is beset with inadequate storage which hampers cross-referencing of records and constrains the orderly and timely updating of the databases in use.[26] The

[22] Igadwah. L., 'Tech Innovations to Disrupt Legal Industry' available at https://www.businessdailyafrica.com/corporate/Tech-innovations-to-disrupt-legal-industry/539550-4165426-7g0cqaz/index.html (accessed on 22/04/2021)

[23] HiiL, 'M-Sheria; Mobile law in Kenya', available at http://www.hiil.org/project/M-Sheria-Mobile-law-in-Kenya (accessed on 22/04/2021)

[24] Kigwiru. V., 'Emerging Technological Innovations in the Legal Profession and its Impact on the Regulation of Market Competition: Kenyan Perspective' available at https://poseidon01.ssrn.com/delivery.php?ID=584095096086108097087112070005001127032069023053024057123008000026070121029098124025037027038012044049023030011123090115015123119094030029067023094004115087094029110038038064024111102065087071085089009126097030079021096094064093070004094092084004002021&EXT=pdf&INDEX=TRUE (accessed on 22/04/2021)

[25] e Citizen, https://www.ecitizen.go.ke/ (accessed on 22/04/2021)

[26] Ministry of Lands and Physical Planning, Report on Electronic Land Transactions, Registration, Conveyancing and Other Related Activities under the Land Registration

Ministry thus proposed an e-conveyancing system that entails land conveyance workflow automation through online platforms/portals and online payments.[27] However, this move towards automation of land services was opposed by the Law Society of Kenya which argued that there were no consultations and further that the move undermined the integrity of the land registry. This reaction by the Law Society of Kenya highlights the challenges likely to be faced towards adoption of legal technology in Kenya due to the monopoly enjoyed by lawyers in the provision of these services.

Law firms are also increasingly adopting ICT infrastructure to streamline their activities through the use of computers. This has in turn facilitated information and data storage, file retrieval and case management.

4. Challenges Facing The Adoption of Legal Technology in Kenya

4.1 Information Security Concerns

One of the greatest challenges associated with technology is the issue of data privacy.[28] IT systems are subject to malpractices such as hacking and malware attacks that can compromise the integrity of information or even delete such information. This challenge is especially great when it comes to legal processes or documents that require extraordinary care in order to prevent breach of data.[29] In case of hearings conducted by videoconferencing, the log-in details may be accessed by third parties who can gain unauthorised accesses

Act, 2012, the Land Act, 2012 and the Community Land Act, 2016, available at https://lands.go.ke/wp-content/uploads/2020/03/Final-Report-Signed.pdf.pdf (accessed on 22/04/2021)

[27] Ibid

[28] Katharine Perekslis, 'Four Strategies to Navigate Data Privacy Obligations for Compliance, Litigation, and E-Discovery Professionals' (*Law.com*) https://www.law.com/native/?mvi=7bd540437dde4b60991f35c257adc521 (accessed on 22/04/2021)

[29] Muigua. K., 'Embracing Science and Technology in Legal Education for Efficiency and Enhanced Access to Justice' available at http://kmco.co.ke/wp-content/uploads/2021/04/Embracing-Science-and-Technology-in-legal-education-for-Efficiency-and-Enhanced-Access-to-Justice-Kariuki-Muigua-April-2021.pdf (accessed on 23/04/2021)

to the proceedings thus raising security concerns especially in cases where privacy in paramount.[30]

4.2 Credibility Concerns

Adoption of IT processes in the legal profession can raise credibility concerns especially in relation to virtual hearings. One of the advantages of physical hearings is that the court may be able to discern the credibility of a witness by observing his/her demeanour, body language, facial expression and tone. However, virtual hearings raise the concern that the loss of in-person observation will impair the court's ability to assess the credibility and strength of the evidence during witness examination.[31] There are also concerns that a witness may be coached off camera during the examination process thus hindering the credibility of evidence presented before the court.

4.3 Inadequate Capacity to acquire and maintain IT infrastructure

The availability and uptake of IT infrastructure in the legal profession is determined by the ability of various players to acquire these tools. In relation to law firms, it may not be possible for small law firms to effectively acquire IT systems such as computer hardware, software, networks and even personnel to offer the necessary technical assistance. The costs associated with IT systems may result in some parties or advocates being locked away from the process[32]. Adoption of IT would normally require strong internet connection and electronic gadgets such as laptops that may not be within the reach of everyone especially small law firms and organizations.

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[30] Muigua. K., 'Virtual Arbitration Amidst COVID-19: Efficacy and Checklist for Best Practices' available at http://kmco.co.ke/wp-content/uploads/2020/05/Virtual-Arbitration-Proceedings-Amidst-COVID-19-Efficacy-and-Checklist-for-Best-Practices69523-Revised.pdf (accessed on 23/04/2021)

[31] Walker.J., Virtual Hearings: An Arbitrator's Perspective, available at https://int-arbitrators.com/wp-content/uploads/2020/03/Virtual-Hearings-An-Arbitrators-Perspective.pdf (accessed on 23/04/2021)

[32] Muigua. K., & Ombati. J., Achieving Expeditious Justice: Harnessing Technology for Cost Effective International Commercial Arbitral Proceedings, available at http://kmco.co.ke/wp-content/uploads/2018/12/Achieving-expeditious-Justice-Harnessing-Technology-for-Cost-Effective-Arbitral-Proceedings-17th-December-2018.pdf (accessed on 23/04/2021)

Adoption of IT means that an organization should be highly committed to meet costs such as installation and regular service such as formatting of computer systems, re-configuration, replacement and other technical operations. The cost of acquiring and maintenance is therefore a limiting factor in adoption of IT by players in the legal profession such as small law firms.

4.4 Inadequate Training

Training is a critical element in the uptake of IT by the legal profession in Kenya. Training is any process by which the attitudes, skills and abilities of employees to perform specific objectives other than education which is wider in scope and more general in purpose.[33] Training increases the technical know-how required for efficient performance of a particular job or task.[34]

Use of IT infrastructure requires technical knowhow that may not be within the reach of most advocates. This creates a knowledge and skills gap that hinders effective use of IT systems in the legal profession. An example can be seen from the virtual court sessions that were adopted as a result of the outbreak of the COVID-19 pandemic where some advocates have had challenges to log in to the sessions or even address the court as a result of limited technological know-how.

5. Way Forward: Enhancing The Adoption of it in the Legal Profession in Kenya

5.1 Adoption of IT Infrastructure

While progress has been made towards adoption of IT infrastructure, there is need for more concerted efforts in order to ensure optimal use of IT in the legal profession. Adoption of IT depends on availability of computer hardware, software as well as personnel. Players in the legal profession especially advocates should ensure that law firms have adequate computer hardware, software, networks and even configuration platforms to ensure adoption of IT systems.

[33] Susskind, R. E. (1996), *The Future of Law: Facing the challenges of Information Technology*, 2nd ed., Oxford, Oxford University Press, Op Cit
[34] Ibid

The uncertainties created by the COVID-19 pandemic should be a wake up call and accelerate efforts towards adoption of IT in the legal profession in Kenya. The pandemic has not only changed the way lawyers view their approach to legal work but has also created an opportunity for them to weigh and reconsider how law firms will operate in the near future.[35] Law firms should consider improving their operations though effective networking and virtual offices in order to bridge physical boundaries. Lawyers can utilise IT to render legal services from the comfort of their homes or offices regardless of the geographical location or distance.

5.2 Training

E-literacy training imparts knowledge and technical skills to operate computer systems. Players in the legal profession including advocates, judges and magistrates should partner with the system designers and developers to offer end user support which also encompasses training on system aspects in order to enhance their technical know-how. These training sessions can be facilitated by the respective bodies such as the Law Society of Kenya and the Judiciary Training Institute in order to ensure that their members are well equipped with technical skills in IT.

The judiciary should also facilitate training sessions on the e-filing system adopted in the wake of the COVID-19 pandemic to ensure smooth utilisation of the platform by lawyers in filing court documents and pleadings. This will in turn translate into efficient access to justice through the application of these skills.

5.3 Information Security Protection

One of the key challenges arising from the adoption IT in the legal profession is information security. There is need to enhance information protection and ensure data protection. There is need for players such as law firms to invest in

[35] Muigua. K., Legal Practice and New Frontiers: Embracing Technology for Enhanced Efficiency and Access to Justice, available at http://kmco.co.ke/wp-content/uploads/2020/06/Legal-Practice-and-New-Frontiers-Embracing-Technology-for-Enhanced-Efficiency-and-Access-to-Justice-Kariuki-Muigua-Ph.D-June-2020.pdf (accessed on 21/04/2021)

data protection infrastructure to guarantee the safety and integrity of their data and prevent malicious attacks and data breaches.[36]

6.0 Conclusion

It is evident that emerging technologies will continue to compete with legal professions in delivering legal services that were once done exclusively by lawyers. While the profession has hitherto been associated with conservatism characterized with its slow pace in adopting change, this position is no longer tenable. The COVID-19 pandemic has demonstrated the increasing role that technology will play in our lives in the wake of reduced human interaction. The legal profession risks being overtaken by technology unless concerted efforts are taken to embrace change. There is need for enhanced adoption of Information Technology in the legal profession in Kenya as a tool of access to justice.

[36] International Chamber of Commerce (ICC), 'ICC Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic' available at https://iccwbo.org/publication/icc-guidance-note-on-possible-measures-aimed-at-mitigating-the-effects-of-the-covid-19-pandemic/ (accessed on 23/04/2021)

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Effects of Climate Change on Pastoralist Women in the Horn of Africa

By: Berita M. Musau*

Abstract

The Horn of Africa is one of the most volatile regions in Africa that has to grapple with challenges such as civil wars, famines, droughts and even weak governance. Environmental degradation and consequently climate change have exacerbated these already extant problems in the region. Pastoralist communities in the Horn living mainly in the peripheries and borderlands whose way of live entails a direct interaction with and reliance on the environment have been adversely affected by climate change. Pastoralist women have borne the brunt of climate change more than their male counterparts owing to their nature and their gendered roles within the pastoralist system. This paper seeks to examine the effects that climate change has had on pastoralist women in the Horn of Africa. It begins by looking at climate change in International Relations and then discusses pastoralism at the Horn of Africa, linking it with climate change and pastoralist conflicts in order to put the research into perspective. Taking an ecofeminist viewpoint, the paper further establishes the nexus between women, the environment and climate change and then examines the impact of climate change on women in the research area (the Horn of Africa). The paper concludes by advocating empowerment of the pastoralist women which would in turn help the entire pastoralist communities in the Horn of Africa.

Introduction

The Horn of Africa has historically suffered fluctuating climatic conditions that have worsened over time aggravating the already existing social and political conflicts that characterize the region (Cechvala, 2014). Adverse climatic conditions have resulted to forced migrations, massive displacement of people and disruption of livelihoods among the population especially the pastoralists. The Intergovernmental Panel on Climate Change (IPCC) predicts

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that by 2050, rainfall will decline by ten percent in the Horn of Africa (Cechvala, 2014) which is likely to lead to conflicts over competition for resources, migrations, violence, and loss of livestock among others effects. Prolonged droughts in Kenya, Ethiopia, Djibouti and Somalia have led to severe food crises affecting millions of farmers and pastoralists (Abebe, 2014:111). Different places, gender, age and classes are impacted differently by climate change.

This paper seeks to establish a nexus between climate change and gender in the Horn of Africa. It explores the impact of climate change on the pastoralist women in the Horn of Africa. It argues that although climate change has adversely impacted pastoralist communities at the Horn of Africa, the social division of labor and the structure of the pastoralist communities have increased the vulnerability of pastoralist women such that the impacts of climate change are more adverse on women than on men. This has been exacerbated by the erosion of traditional way of life coupled with impacts of globalization that have led to commercialization of cattle rustling and the consequent increase lethality of the raids in which women have been targeted for rape and murder. As such the human security of women remains at risk.

Climate Change in International Relations

Global climate change is one of the main challenges that the international community faces (Salehyan, 2008). Climate change and its consequences have thus received a lot of attention in public debates. Since the 1980s, climate change has been a major topic among scholars and policy makers and has dominated international politics. It is regarded as a major threat to human existence on earth. Climate change is considered one of the major political and institutional as well as ecological challenges facing the world (Keohane, 2015). It has attracted multilateral cooperation in form of forums and institutions such as Rio Earth Summit, United Nations Framework Convention on Climate Change (UNFCCC), Kyoto Protocol, the Intergovernmental Panel on Climate Change (IPCC), the Conference of Parties (COP) and many others.

It is predicted that climate change will lead to melting of ice at Antarctica, warming and expansion of oceans, rising of sea levels, stronger storms, droughts, floods and other forms of extreme weather, poor agricultural production, tropical diseases and many other alarming effects (Keohane,

2015). Developing countries are said to be the ones likely to suffer more. In 2007, the Intergovernmental Panel on Climate Change (IPCC, 2007) predicted that in some of the developing countries; agricultural production could decline by as much as 50 percent by 2020.

The Horn of Africa has been a key focus with regard to effects of climate change since it is one of the hardest hit. Indeed research attributed the famous 1984 famine in Ethiopia that attracted widespread international awareness to effects of climate change (Sil, et al. 2014). In fact drought, desertification and famine were the main reason behind the creation of the Intergovernmental Authority on Drought and Development (IGADD). The organization was established in 1986 with the mandate of addressing ecological issues such as desertification in order to avert drought and famine that had perennially affected the Horn of Africa (Adar, 2000:39). In 1996 IGADD changed to Intergovernmental Authority on Development (IGAD) and its mandate expanded from that of dealing with ecological and humanitarian issues to also include conflict resolution, prevention and management (Adar, 2000: 43).
Climate change is the biggest long term threat against efforts and prospects of ending various challenges to humanity such as poverty, hunger and malnutrition. Therefore, while working hard to avert climate change, it is important to enhance adaptation mechanisms to climate change in agriculture including livestock and other efforts.

Pastoralism at the Horn of Africa

Kandagor (2005:3) defines pastoralism as a subsistence form of agricultural livelihood in which people make a living by raising domesticated herds of large herbivores such as cattle, goats, donkeys, camels, and sheep. It is considered a traditional form of land management and production that mimics wildlife in its basic principles (Hartman, Sugulle & Awale, 2010:19). Thus, pastoralism entails people's direct interaction with the natural environment.

The Horn of Africa (or Somali Peninsular) is a peninsular of Eastern Africa that extends into the Arabian Sea and lies along the southern side of the Gulf of Aden (Abshir, 2020:7). It is the easternmost projection of the African continent whose name is derived from its resemblance with a rhinoceros' horn. The term is also used to refer to the greater Horn region containing the republics of Djibouti, Ethiopia, Eritrea, Somalia, Sudan, South Sudan, Kenya

and Uganda all of which are member states of the Intergovernmental Authority on Development (IGAD). The latter use of the term is the one that this paper adopts. It covers approximately 2, 000, 000 km^2 and it is inhabited by about 80 million people (Mkutu, 2003). There are about forty million pastoralists in the world. Of these, more than thirty percent live in Africa. The Horn of Africa hosts the largest groupings of pastoralists, in the world (Burgess, 2009:86). Sudan hosts the largest percentage globally, with Somalia and Ethiopia following after while pastoralists form one third of the population in Djibouti (Furusa & Furusa 2014, Kandagor, 2005:7).

Some of the pastoralist communities in the Horn of Africa include the Karamojong, a group of pastoralist communities that inhabit the border areas between Kenya, Ethiopia, South Sudan and Uganda, a region referred to as the Karamoja Cluster (Kandagor, 2005:5). They include communities such as the Turkana and Pokot in Kenya, the Dodoth, Pian and Upe in Uganda, the Toposa in South Sudan and the Merile in Ethiopia. Others include the Samburu, Somali and Rendile at the Kenya - Somali border and the Maasai living in Kenya and Tanzania.

Pastoralists in the Horn of Africa inhabit the arid and semi arid areas. Thus they live in some of the harshest environments in the world. Their environmental conditions are characterized by an extreme variability of rainfall, recurrent droughts and resource scarcity. Their lifelong routine entails movement from place to place in search for pastures and water for their livestock. The time and movement of the pastoralists is therefore determined by wet and dry seasons and the availability of pastures (Furusa & Furusa, 2014).

Pastoralist communities at the Horn of Africa have highly gendered structures that involve clearly defined roles for men and women. Kandagor (2005) points out that most of the pastoralist communities have a patriarchal tradition and are mainly dominated by men. It is the men who make the most important decisions and they are also the sole owners of the stocks while the women are principally tasked with the responsibility of taking care of children and performing domestic chores. The contribution of pastoralism to the economies of the Horn of African countries cannot be underestimated. The arid and semi-arid areas of the Horn of Africa contribute 20 to 30 percent of the countries'

GDP. In Kenya for instance, pastoralism generates 70 percent of cash income and half of the country's livestock (Mkutu, 2003). The livestock sector in Kenya provides employment to about 50 percent of the agricultural labour force and it is the main source of income for over 10 million Kenyans living in the Arid and Semi-Arid Areas (Omolo & Mafongoya, 2019:745). In Ethiopia and Somalia, livestock forms part of the top export commodities thus making a significant contribution to the countries' GDP (Sundblad, 2013). The Kenya-Somalia-Ethiopia borderlands form a key trading zone that has flourished in spite of conflicts and insecurity that characterize these peripheral regions (Sundblad, 2013).

Pastoralists at the Horn of Africa are among the most marginalized and disadvantaged minority groups. This is due to their wide dispersal, harsh climatic and ecological conditions, state neglect, exclusion from development plans, seizure of their land, land tenure laws, national borders that restrict pastoralists' movement, internal strife and national conflicts (Kandagor, 2005:2). Indeed, Mkutu (2003) observes that, pastoralism as a way of live and a mode of economy is under threat (Catley, Lind & Scoones, 2016: 390; Mkutu, 2003). He reveals that pastoralism is threatened by the combination of weak governance, inadequate land and resource management policies. Political and economic marginalization and increasing insecurity, resulting from small arms and cattle raiding is taking its toll.

Pastoralism and Climate Change at the Horn of Africa: Two Sides of the Same Coin

Pastoralism enables the pastoralists to interact directly with the environment. The environment is therefore a key determinant of their way of life. Through their interaction with the environment, pastoralists have socially constructed pastoralism as their way of life in which they attach a lot of value to their livestock. In fact, even during severe droughts, many pastoralists are usually adamant to sell their livestock and some of them end up dying.

The relationship between pastoralism and climate change has received contrasting views like two sides of the same coin. One the one hand, pastoralism has been viewed as the most suitable form of livelihood for the harsh climatic conditions that are experienced in arid and semi-arid areas which are exacerbated by climate change. Pastoralism in this view is also

applauded for creating favourable environments for biodiversity in Savannah ecosystems around the globe (Klemenwork, 2015:272). It is considered to be highly resilient and able to exploit land and conditions that normally cannot support other economic activities (Amsalu & Wana, 2013). Due to its dynamic, complex and flexible structures, pastoralism is considered to be the one mostly adapted to erratic climate and changing natural conditions of dry lands and also essential for sustainable management and ecological health of the dry lands (Buckingham & Le Masson 2017, Hartmann, Sugulle & Awale, 2010). Pastoralism has been hailed as a rational use of the dry lands vibrant and productive livelihood system whereby pastoralists respond to, use and even choose to profit from climate variability allowing for a vibrant and productive livelihood system in some of the harshest landscapes of the world (HPG, 2009). Pastoralists achieve this by using mobility to respond to fluctuations in resource availability dictated by dry land's scarce and unpredictable rainfall. Through pastoralism, Horn of Africa's dry lands are said to contribute significantly to national economies and to food security.

On the other hand, pastoralism is considered by others as a way of life that is unsuitable and outdated for the modern world. Those that subscribe to this view are informed by Garrett Hardin's theory of "*Tragedy of Commons'* which portrays pastoralism as economically unreasonable and a major cause of ecological problems (Harding, 1968; Klemenwork, 2015:272). Harding viewed pastoralism as a major source of environmental degradation and subsequent climate change. Indeed, most national governments in the Horn of Africa tend to subscribe to this view and have tried to force pastoralists to abandon their migrations and reduce the size of their herds in order to prevent overgrazing (Kandagor, 2005:5). Flintan (2006:224) for instance points out that the pastoralists in Ethiopia have been marginalized from investments and support and are under constant pressure to change their way of life, with much of the land that they use especially along the major rivers being considered by development planners as vacant.

It is however important to note that in spite of pastoralist's adaptability to harsh environments and climatic conditions, it is also very sensitive to climate change. While droughts and poor rains characterize the arid and semi arid areas of the Horn of Africa, climate change has worsened the situation. In fact, World Bank's (2007b) prediction that global climate change would result in

more frequent and severe extreme weather events, such as drought and floods, increasing risk to natural resource dependent livelihoods and have disproportionate negative impact on developing countries in Africa, South Asia and parts of Latin America is being witnessed. The Horn of Africa has experienced a great amount of ecological turbulence which has greatly affected pastoralist communities.

Climate Change and Pastoralist Conflicts at the Horn of Africa

The supposition that climate change would exacerbate resource scarcity, create mass population dislocations and ultimately fuel conflicts has become a reality at the Horn of Africa. Dwindling pasture and water resources at the Horn have led to competition among pastoralist communities and have on many occasions resulted in violent confrontations. The dominant form of violent conflicts among pastoralists is cattle raiding. It involves a group invasion or attack by an outside group with the main objective of stealing cattle (Raleigh & Kniveton, 2012). This is done mainly as a means of expanding rangelands, restocking herds and improving social status. Communities carry out mass cattle rusting to replenish stocks that are depleted by drought and famines. Climate change and the resultant environmental pressures and scarcity of water and land has been argued to be the cause of violent conflicts in Darfur (Banki Moon, 2007, cited in Salehyan, 2008:316). Salehyan (2008:316) correctly argues that the link between climate change and conflicts centers on resource scarcity and competition for the means to sustain livelihoods.

However, some studies have yielded contradictory results regarding the relationship between climate change and violent conflict. Studies done on climate change variability and conflict risk among pastoralist communities in East Africa from 1990-2009, indicated that there were less raids during the dry periods and more during rainy seasons when there was a lot of vegetation cover (Theisen, 2012: Raleih & Kniveton, 2012, Butler & Gates, 2012); . This led the authors to question the assumption that climate change led to violent conflicts among pastoralist communities.

Nevertheless, this study still holds that there is a positive correlation between climate change and pastoralist conflicts. I argue that the timing of the raids in which they mainly occur during the rainy season is a restocking strategy. There

would be less motivation to raid during the dry season because a large stock at that time would pose challenges to pastoralists owing to scarcity of water and pastures.

Pastoralists at the Horn of Africa have however established mechanisms to cope with climate change related disasters. Some of the survival strategies include: mobility (predominantly), herd diversification, slaughtering some livestock for food, selling of animals, selling firewood, urban migration and charcoal production among others (Mushi, 2013, Furusa & Furusa, 2013, Kandagor, 2005). It should however be noted that some of the coping mechanisms adopted such as charcoal burning are still seriously detrimental to the environment and would in turn enhance global warming and further climate change in the long run.

The impact of climate change on pastoralist women is grossly different from that which is experienced by pastoralist men. This study seeks to establish the link between women and the environment.

The Nexus Between Women, the Environment and Climate Change: An Ecofeminist Perspective

The relationship between women and the environment can be explained through the ecofeminist prism. Coined by Francoise D'Eaubonne, a French feminist scholar, ecofeminism which came into international limelight in the 1970s and gained momentum in the 1980s is concerned about human activities on the non-human world (Gares, 1996:7). Ecofeminism views humanity as gendered in such ways that it subordinates, exploits and oppresses women (Mellor, 1997:, cited in Ali, 2011: 4).

Ecofeminism considers women as naturally closer to the environment than men. Women's role as life givers grants them some semblance with the environment that supports life. This link between women and the environment makes them more environments conscious and caring. Thus ecofeminism also holds that women have potential to carry out an ecological revolution that can guarantee the survival of humanity in planet earth because they have always been the first ones to protest against the destruction of the environment.

The roles ascribed to women in most societies from time immemorial enhance their close relationship with the environment. According to Ali (2011) Women are primary users of natural resources such as land, forests, and water because they are the ones responsible for gathering food, fetching firewood and water. Thus women interact more with nature compared to men. They have first hand contact with nature as they struggle to nurture their families. As such, women are the ones who encounter unique firsthand experiences with environmental problems (Norgaard & York, 2005: 507). Fang & Luo (2009) maintain that the social division of labor subjects women to greater harm whenever there are ecological crises. Another argument of ecofeminism is that the destruction of the environment is a source of oppression for women because it becomes difficult for women to easily access natural resources required for survival (Ali, 2011).

Climate change is considered to be a result of human destructive activities to the environment. Effects of climate change in turn have adversely impacted human beings. This affirms the famous statement by the late Prof. Wangari Maathai *"if you destroy nature, nature will destroy you"*. The World Bank (2007b) estimated that global climate would have negative impact on developing countries. Climate change was predicted to lead to events such as droughts and floods with increasing risk to natural dependant livelihoods. It has brought about changes in the traditional workload for women and generally affected their socioeconomic position. Pastoralist communities of the Horn of Africa have borne the brunt of climate change. True to the assertions of ecofeminism, pastoralist women have been more adversely affected by the effects of climate change in their arid and semi-arid habitats.

Effects of Climate Change on Pastoralist Women at the Horn of Africa: Vulnerability and Adaptation

Pastoralist Women's Vulnerability to Climate Change

Climate change affects all societies. However, different groups are affected differently including pastoralists. Since the livelihoods of pastoralists highly depend on natural resources, they are impacted hard by climate change. Within the pastoralist societies, different groups are also affected differently by climate change based on factors such as age, sex, wealth, economic status and rank in the society, ownership of different livestock species, economic

engagement, as well as geographical location (Mushi, 2013). Research points out to the fact that women and men are impacted differently by climate change. Amsalu & Wana (2013) argue that climate change has a gendered dimension whereby women tend to be more vulnerable to climate change related disasters and food insecurities especially among pastoralists at the Horn of Africa.

Buckingham & Virgine (2017) further maintain that the risks of climate change vary for women and men due to their different social and economic conditions. According to them, women are at a greater risk, are more vulnerable and more likely to become victims of climate change because they do not have the same access to resources, have different living conditions and have more restricted capabilities than men. Vulnerability of pastoralist women to climate change at the Horn of Africa is therefore exacerbated by the following factors: gender roles among pastoralist communities; access to and control of vital resources and information; status of pastoralist women regarding decision making; other factors which include globalization and changing structure of the society. These factors are discussed below.

Gender Roles among the Pastoralist Communities

Gender roles are socially constructed, and therefore embodied in the social norms of the society. Women have the predominant role as care givers and nurturers. As such they are entrusted with the responsibility of taking care of children, the old and the sick. Studies by Amsalu & Wana (2013) on pastoral women in Ethiopia, Mushi (2013) on women in Tanzania, Omolo (2012) and Omolo & Mafongoya (2013) on pastoral women in Kenya reveal that the role of pastoralist women extends to also include taking care of young calves, as well as sick and weak livestock. This role proves very overburdening and difficult to accomplish especially during periods of scarcity. In events of climate change related disasters such as floods, many women and those under their care lose their lives since their mobility is restricted.

It is also the role of women to procure food, fetch water and firewood for their families. The UNFCCC (2007) predicted that increased frequencies of drought and associated unreliable rainfall would undermine the availability of food for families which would lead to a heavy burden for women. This was also echoed by the United Nations Convention to Combat Desertification, UNCCD's (2007) revelation that everyone experiences increased stress and hardship in

the wake of scarcity of natural resources. Although this affects both men and women, the burden is more on women since they have to work extra hard in order to compensate for the resource scarcity resulting from climate change (Mushi, 2013). For instance during water scarcity women have to walk longer distances in search of water for family consumption (Amsalu & Wana, 2013, Denton, 2002:12). Sometimes this puts pastoralist women at a risk of attacks, rape and other violent encounters.

Lack of Access to and Control of Vital Resources and Information

In most cases, the women provide labor for the various tasks related to livestock production , but have no control in the decision making process, particularly decisions relating to disposal of the animals and animal products. They are involved in production but may not own the means of production, including livestock, land and water. In fact, ownership of land by women is strictly forbidden (Furusa & Furusa, 2014). This leads to poverty and marginalization of pastoralist women. Women are the majority of the world's poor, and the most vulnerable to climate change. Lack of information worsens the situation. For instance, when natural disasters strike such as floods or drought, more women die than men because of lack of prior or early warning information. This leads to loss of life and livelihood. When poor women lose their livelihoods, they are likely to slip to more poverty and destitution owing to increase in inequality and marginalization.

Status of Pastoralist Women Regarding Decision Making

Pastoralist communities are predominantly male-dominated. Pastoralist women have a subordinate status to men. It is men who make vital decisions in the society. Women are supposed to obey the decisions made and to follow rules and instructions. They therefore lack decision-making power within the household and thus cannot make decisions such as slaughtering animals for food or income during periods of prolonged drought and hunger (Sundblad, 2013). This makes pastoralist women over dependent on men and reduces the climate change coping strategies available to them.

Other Factors that Increase Pastoralist Women's Vulnerability

Climate change also leads to upsurge of conflicts as communities seek to replenish their stocks through cattle raiding especially after drought. This leads to attacks and revenge attacks among various communities. Gender roles

ascribe the responsibility of raiding to men. As men die during the raids, women suffer the loss of their husbands and sons. Moreover, globalization and politics have changed raiding from a traditional exercise into a commercial and political one. Commercialized cattle raiding/rustling is being carried out for profit using sophisticated weapons. This increases the lethality of pastoralist conflicts. Another worrying trend is the fact that women and girls are being increasingly targeted for rape and murder during the cattle raids. This is unlike the past when raiding was a traditional exercise that was guided by elders and respect for life, and women was adhered to. Ecofeminists such as Shiva and Mies (2014) equate this intensification of violence against women with the intensification of human induced environmental problems some of which have led to climate change.

Due to harsh climatic conditions occasioned by climate change, some men are abandoning pastoralism and moving to urban centers leaving women in the village. This leads to breakdown of marriages and families. Moreover, prolonged droughts and other harsh climatic conditions have lead to reduced stocks and in turn caused a decrease in marriages.

Coping and Adaptation of Pastoralist Women at the Horn of Africa to Climate Change

In order to survive the impacts of climate change, women in the pastoralist communities in the Horn of Africa have had to establish coping and adaptation strategies. Some of the coping and adaptive strategies adopted include the following: sale of assets other than livestock, herd diversification and slaughtering of livestock to provide food for families. Other measures include change to agro-pastoralism as well as carrying out irrigation where there are rivers. People are also keen to harvest and store water especially during rainy season. Women have also tried to access relief food mainly from non-governmental organizations including religious organizations.

Pastoralist women also struggle for economic efforts to sustain their livelihoods in times of hardship. They engage in small businesses such as selling firewood (*selling charcoal is the preserve of men*), weaving baskets and also beadwork. In Ethiopia, for instance, it was discovered that during droughts, pastoralist communities, particularly women indicate some shifts in economic activities by dealing in petty trade and cross-border trade

(GebreMichael & Kifle, 2009, cited in Mushi, 2013:2). Education has also been resorted to as a long term process that would eventually redeem the communities from perennial poverty. In an effort to cope with the absence of men in households, and the need to provide security, pastoralist women in the Horn of Africa are increasingly acquiring guns and mastering the art of shooting.

Even in their efforts to cope with effects of climate change, women pastoralist women still encounter bottlenecks. Mushi (2013) revealed that pastoralists have different positions and face different challenges compared to men in coping and adapting to climate change. The challenges that women face include for instance poor access to markets, services and technical information, competing resource uses, policies that favor large-scale producers or external markets and weak institutions.

Conclusion

Climate change is real and its impacts on human beings are clearly visible. This paper has discussed the impacts of climate change on pastoralist women at the Horn of Africa. Through the theory of ecofeminism, the study has visualized and underscored women's relationship with the environment which consequently increases their interest and concern for the environment while increasing their vulnerability. The research has then applied this visualization to highlight the way climate change has impacted on pastoralist women in the Horn of Africa. It has highlighted the social and structural factors within the pastoralist communities that enhance the vulnerability of pastoralist women in the Horn to the effects of climate change as well as the coping and adaptive mechanisms and strategies that the women have adopted in order to survive and nurture their families. Since climate change has become reality that has to be reckoned with, it is laudable then that pastoralist women have been making an effort to adapt and cope with it. Addressing the challenges that they face in their efforts to adapt and cope would go a long way not only in helping the pastoralist women but also the entire communities. Pastoralist women also ought to be empowered in all aspects: socially, economically, politically, and culturally.

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Resource Mobilization for Sustainable Development in Kenya

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Abstract

The Covid-19 pandemic has exposed how many developing countries especially in Africa have fragile economies which are over-reliant on foreign financial resources. This is especially so within the African continent which, ironically has so much natural resources which if well utilized, would otherwise make the continent self-sustaining. Kenya falls within these countries, and this paper thus explores some of the ways that the country can work towards achieving the true independence of financing its own economy, with little or no need for foreign aid by increasing its efforts towards domestic resource mobilization as a step towards achieving the sustainable development goals as laid out in the 2030 Agenda for Sustainable Development Goals as well as the country's Vision 2030 Development Blueprint.

1. Introduction

This paper is mainly inspired by 2030 Agenda for Sustainable Development Goals (SDGs)[1] goal 17 which seeks to strengthen the means of implementation and revitalize the global partnership for sustainable development. The SDG Goal 17 acknowledges that the SDGs cannot be realised without the global cooperation amongst countries as well as mobilizing the relevant resources necessary to achieve these goals.[2] Target 17.1 seeks to strengthen domestic

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[1] UN General Assembly, *Transforming our world: the 2030 Agenda for Sustainable Development*, 21 October 2015, A/RES/70/1.

[2] Martin, 'Global Partnerships' (*United Nations Sustainable Development*) <https://www.un.org/sustainabledevelopment/globalpartnerships/> accessed 8 March 2021.

resource mobilization, including through international support to developing countries, to improve domestic capacity for tax and other revenue collection. Domestic Resource Mobilization remains essential to accelerate economic growth and lift people from extreme poverty, particularly in the low-income countries, an important component of the SDGs.[3]

2. Sustainable Development: Laying the Groundwork

SDG Goal 17 requires global actors to 'strengthen the means of implementation and revitalize the global partnership for sustainable development'.[4] The related targets and indicators include to: strengthen domestic resource mobilization, including through international support to developing countries to improve domestic capacity for tax and other revenue collection; Developed countries to implement fully their official development assistance commitments, including the commitment by many developed countries to achieve the target of 0.7 per cent of Official development assistance (ODA)[5]/ Gross national income (GNI)[6] to developing countries and 0.15 to 0.20 per cent of ODA/GNI to least developed countries ODA providers are encouraged to consider setting a target to provide at least 0.20 per cent of ODA/GNI to least developed countries; Mobilize additional financial resources for developing countries from multiple sources; Assist developing countries in attaining long-term debt sustainability through coordinated policies aimed at fostering debt financing, debt relief and debt restructuring, as appropriate, and address the external debt of highly indebted poor countries to reduce debt distress; Adopt and implement investment promotion regimes for least developed countries; Enhance North-South, South-South and

[3] Yamada K, 'Financing Sustainable Development with Enhanced Domestic Resource Mobilization: Transitional Role of International Cooperation' (2017) 23 Asia-Pacific Development Journal 61, at 61.

[4] SDG Goal 17.

[5] Official development assistance (ODA) is defined as government aid designed to promote the economic development and welfare of developing countries. 'Official Development Assistance (ODA) - Net ODA - OECD Data' (*the OECD*) <http://data.oecd.org/oda/net-oda.htm> accessed 24 March 2021.

[6] Gross national income (GNI) is defined as gross domestic product, plus net receipts from abroad of compensation of employees, property income and net taxes less subsidies on production. ('National Income - Gross National Income - OECD Data' (*the OECD*) <http://data.oecd.org/natincome/gross-national-income.htm> accessed 24 March 2021.)

triangular regional and international cooperation on and access to science, technology and innovation and enhance knowledge sharing on mutually agreed terms, including through improved coordination among existing mechanisms, in particular at the United Nations level, and through a global technology facilitation mechanism; Promote the development, transfer, dissemination and diffusion of environmentally sound technologies to developing countries on favourable terms, including on concessional and preferential terms, as mutually agreed; Fully operationalize the technology bank and science, technology and innovation capacity-building mechanism for least developed countries by 2017 and enhance the use of enabling technology, in particular information and communications technology; Enhance international support for implementing effective and targeted capacity-building in developing countries to support national plans to implement all the sustainable development goals, including through North-South, South-South and triangular cooperation; Promote a universal, rules-based, open, non-discriminatory and equitable multilateral trading system under the World Trade Organization, including through the conclusion of negotiations under its Doha Development Agenda; Significantly increase the exports of developing countries, in particular with a view to doubling the least developed countries' share of global exports by 2020; Realize timely implementation of duty-free and quota-free market access on a lasting basis for all least developed countries, consistent with World Trade Organization decisions, including by ensuring that preferential rules of origin applicable to imports from least developed countries are transparent and simple, and contribute to facilitating market access; Enhance global macroeconomic stability, including through policy coordination and policy coherence; Enhance policy coherence for sustainable development; Respect each country's policy space and leadership to establish and implement policies for poverty eradication and sustainable development; Enhance the global partnership for sustainable development, complemented by multi-stakeholder partnerships that mobilize and share knowledge, expertise, technology and financial resources, to support the achievement of the sustainable development goals in all countries, in particular developing countries; Encourage and promote effective public, public-private and civil society partnerships, building on the experience and resourcing strategies of partnerships; by 2020, enhance capacity-building support to developing countries, including for least developed countries and small island developing States, to increase significantly the availability of high-quality,

timely and reliable data disaggregated by income, gender, age, race, ethnicity, migratory status, disability, geographic location and other characteristics relevant in national contexts; and by 2030, build on existing initiatives to develop measurements of progress on sustainable development that complement gross domestic product, and support statistical capacity-building in developing countries.[7]

These targets are spread over several target areas namely: finance; technology; Capacity-Building; Trade; and Systemic issues which entail, Policy and institutional coherence, Multi-stakeholder partnerships, and Data, monitoring and accountability.[8]

In order to achieve the sustainable development goals, the 2015 Addis Ababa Action Agenda on Financing for Development captured the importance of domestic resource mobilization, noting that the "mobilization and effective use of domestic resources ... are central to our common pursuit of sustainable development."[9] Notably, it has rightly been pointed out that the only reliable and sustained sources of government revenue are taxes and some non-tax revenue instruments, such as royalties and resource rents from extractive industries and, to a limited extent, user fees for public services, generally delivered by local governments.[10] However, most African countries have been over relying on foreign aid and loans to fund their ever expanding national budgets. Kenya is no exception. With the pressure and the 2030 deadline to achieve the sustainable development goals, the need for alternative funding will only grow. As such, there is a need for these countries to not only look for alternative sources of the required financial resources but also the ones that come with less complications and strings attached. It is for this reason that these countries need to focus more on capitalizing on domestic resource mobilization as a source of funding development projects. This is important as

[7] 'SDG 17: Strengthen the Means of Implementation and Revitalize the Global Partnership for Sustainable Development – SDG Compass' <https://sdgcompass.org/sdgs/sdg-17/> accessed 8 March 2021.
[8] Ibid.
[9] Junquera-Varela, R. F., Verhoeven, M., Shukla, G. P., Haven, B., Awasthi, R., & Moreno-Dodson, B., *Strengthening Domestic Resource Mobilization: Moving from Theory to Practice in Low-and Middle-Income Countries* (The World Bank 2017), chapter Two.
[10] Ibid, 5.

Official development assistance (ODA) is finite and fluctuates over time, creating uncertainty for recipient countries about planning, budgeting, and expenditures in the public sector.[11]

It is documented that when the investment requirements for the Sustainable Development Goals (SDGs) were first assessed in the United Nations Conference on Trade and Development's (UNCTAD's) World Investment Report 2014, at least 10 relevant sectors (encompassing all 17 SDGs) were identified and the report projected an annual investment gap of $2.5 trillion in developing countries.[12] While this projection remains valid today according to a recent review (UNCTAD, 2020), the SDGs have significant resource implications across developed and developing countries and require a step-change in levels of both public and private investment in the SDGs.[13]

The need for enhanced domestic resource mobilization is also more urgent in light of the UNCTAD's observations that the COVID-19 shock has exacerbated existing constraints for the SDGs and could undo the progress made in the last six years in SDG investment and the international private sector investment flows to developing and transition economies in sectors relevant for the SDGs were also expected to fall by about one-third in 2020 because of the COVID-19 pandemic, posing a risk to delivering on the 2030 agenda for sustainable development.[14]

Thus, as part of laying the groundwork for the achievement of SDGs, there is a need for countries, including Kenya, to review their domestic resource mobilization efforts and work towards enhancing the same.

[11] Ibid, 6.
[12] Zhan JX and Santos-Paulino AU, 'Investing in the Sustainable Development Goals: Mobilization, Channeling, and Impact' (2021) 4 Journal of International Business Policy 166.
[13] Ibid.
[14] Zhan JX and Santos-Paulino AU, 'Investing in the Sustainable Development Goals: Mobilization, Channeling, and Impact' (2021) 4 Journal of International Business Policy 166.

3. Domestic Resource Mobilization in Kenya: Challenges and Prospects

a. Corruption

Transparency International defines 'corruption' as simply the abuse of entrusted power for private gain.[15] Kenya's *Anti-Corruption and Economic Crimes Act, 2003*[16] defines "corruption" to include: bribery; fraud; embezzlement or misappropriation of public funds; abuse of office; breach of trust; or an offence involving dishonesty — (i) in connection with any tax, rate or impost levied under any Act; or (ii) under any written law relating to the elections of persons to public office.[17] These are just some of the activities that may be termed as corruption together with many forms of their derivatives. Corruption can be classified as grand, petty and political, depending on the amount of money lost and the sector where it occurs, where: grand corruption consists of acts committed at a high level of government that distort policies or the central functioning of the state, enabling leaders to benefit at the expense of the public good; petty corruption refers to everyday abuse of entrusted power by low and mid-level public officials in their interactions with ordinary citizens, who often are trying to access basic goods or services in places like hospitals, schools, police departments, and other agencies; and, political corruption is a manipulation of policies, institutions and rules of procedure in the allocation of resources and financing by political decision makers, who abuse their position to sustain their power, status and wealth.[18]

The *United Nations Convention against Corruption*[19], the only legally binding universal anti-corruption instrument, captures in its preamble the State Parties' concern about the seriousness of problems and threats posed by corruption to the stability and security of societies, undermining the institutions and values

[15] 'What Is Corruption?' (*Transparency.org*) <https://www.transparency.org/en/what-is-corruption> accessed 21 March 2021.
[16] *Anti-Corruption and Economic Crimes Act,* No. 3 of 2003, Laws of Kenya.
[17] Ibid, sec. 2.
[18] 'The Fight against Corruption in Kenya…Yet another Chapter' <https://cytonn.com/topicals/the-fight-against-corruption-in-kenyayet-another-chapter> accessed 21 March 2021.
[19] UN General Assembly, *United Nations Convention Against Corruption*, 31 October 2003, A/58/422.

of democracy, ethical values and justice and jeopardizing sustainable development and the rule of law.[20]

Corruption is considered to be rampant in many developing and poor countries, making them struggle with putting in place anti-corruption measures as part of their development strategy.[21] Notably, corruption leads governments to intervene where they need not, and it undermines their ability to enact and implement policies in areas in which government intervention is clearly needed—whether environmental regulation, health and safety regulation, social safety nets, macroeconomic stabilization, or contract enforcement.[22]

The World Bank rightly points out that corruption is a complex phenomenon whose roots lie deep in bureaucratic and political institutions, and its effect on development varies with country conditions.[23] While the Constitution of Kenya 2010 captures the national values and principles of governance under Article 10 as well as the principles of leadership and integrity as captured under Chapter Six thereof, corruption is still widespread in Kenya. It has been pointed out in other studies that Kenya's competitiveness is held back by high corruption levels that penetrate every sector of the economy, which is evidenced by: a weak judicial system and frequent demands for bribes by public officials leading to increased business costs for foreign investors; widespread tax evasion hindering Kenya's long-term economic growth; and rampant fraud in public procurement.[24] This is despite the fact that corruption, active and passive bribery, abuse of office and bribing a foreign public official are criminalized under the Anti-Corruption and Economic Crimes Act 2003,

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[20] Ibid, Preamble.

[21] Banerjee A, Mullainathan S and Hanna R, 'Corruption' (National Bureau of economic research 2012).

[22] 'Helping Countries Combat Corruption: The Role of the World Bank' <http://www1.worldbank.org/publicsector/anticorrupt/corruptn/cor02.htm> accessed 21 March 2021.

[23] 'Helping Countries Combat Corruption: The Role of the World Bank' <http://www1.worldbank.org/publicsector/anticorrupt/corruptn/cor02.htm> accessed 21 March 2021.

[24] 'Kenya Corruption Report' (GAN Integrity) <https://www.ganintegrity.com/portal/country-profiles/kenya/> accessed 21 March 2021.

in addition to the Bribery Act of 2016 which seeks to strengthen the fight against the supply-side of corruption.[25] Arguably, the main problem lies with the inadequate enforcement of Kenya's anti-corruption framework which is an issue as a result of weak and corrupt public institutions.[26]

According to the Transparency International Corruption Perception Index 2020 Report, Kenya was ranked position 124 out of 180, with a score of 31 out of possible 100.[27] The lowest average regional score was Sub-Saharan Africa which had 32 out of 100, against Western Europe & European Union which scored 66 out of 100.[28] Notably, Kenya has only gained a score of +4 since the year 2012.[29] Indeed, in the past, President Uhuru Kenyatta has acknowledged corruption has reached levels that threaten national security.[30] There have been widespread reports on recurrence of grand corruption scandals at the national level, ranging from pilfering public funds to scandals surrounding grand schemes and artificial inflation of the prices of large public projects, like the standard-gauge railway, to procurement-related fraud that shook central government departments like the National Youth Service and State Department of Health.[31]

Transparency International rightly observes that corruption erodes trust, weakens democracy, hampers economic development and further exacerbates inequality, poverty, social division and the environmental crisis.[32] It is worth pointing that these are the key elements of sustainable development agenda without which it remains a mirage.[33] It is estimated that Kenya loses a third

[25] Ibid.
[26] Ibid.
[27] 'Corruption Perceptions Index 2020 for Kenya' (*Transparency.org*) <https://www.transparency.org/en/cpi/2020> accessed 21 March 2021.
[28] Ibid.
[29] Ibid.
[30] Miriri D, 'Third of Kenyan Budget Lost to Corruption: Anti-Graft Chief' *Reuters* (10 March 2016) <https://www.reuters.com/article/us-kenya-corruption-idUSKCN0WC1H8> accessed 21 March 2021.
[31] 'BTI 2020 Kenya Country Report' (*BTI Blog*) </en/reports/country-report-KEN-2020.html> accessed 21 March 2021.
[32] 'What Is Corruption?' (*Transparency.org*) <https://www.transparency.org/en/what-is-corruption> accessed 21 March 2021.
[33] Omar M, 'The Implications of Corruption on Kenya's Sustainable Development and Economic Growth' (PhD Thesis, University of Nairobi 2020).

of its state budget - the equivalent of about $6 billion - to corruption every year.[34]

b. Huge Public Wage Bill in Kenya

While the devolved system of governance in Kenya came with its advantages, it also came with a lot of disadvantages as far as public wage bill is concerned, due to the expanded workforce for both the national and the county governments.[35] For instance, while the county-level development projects, including roads and clinics, are increasingly visible and have spurred economic growth across sectors within Kenya's counties, criticism continues to grow regarding the localization of ethnic politics, inefficiency, the size of the country's wage bill and the "devolution" of corruption.[36] Governors have been accused of spending huge amounts of allocated funds on salaries as opposed to development leading to slowed growth in the devolved units.[37]

The ballooning wage bill affects allocation to the key sectors of the economy which would go directly towards ensuring that Kenya makes positive steps towards achieving the sustainable development goals. Salaries and Remuneration Commission has in the past pointed out that a wage bill that does not match economic and revenue growth puts pressure on development and investment share of fiscal budget meaning that there is less money to devote to development projects and provision of social services such

[34] Miriri D, 'Third of Kenyan Budget Lost to Corruption: Anti-Graft Chief' *Reuters* (10 March 2016) <https://www.reuters.com/article/us-kenya-corruption-idUSKCN0WC1H8> accessed 21 March 2021.

[35] August 01 2017 T, 'Public Wage Bill Rises by Sh90bn in Nine Months' (*Business Daily*) <https://www.businessdailyafrica.com/bd/economy/public-wage-bill-rises-by-sh90bn-in-nine-months--2163328> accessed 21 March 2021; April 20 2017 T, 'Counties Wage Bill to Hit Sh116bn by June This Year' (*Business Daily*) <https://www.businessdailyafrica.comhttps://www.businessdailyafrica.com/bd/economy/counties-wage-bill-to-hit-sh116bn-by-june-this-year-2148440> accessed 21 March 2021.

[36] 'BTI 2020 Kenya Country Report' (*BTI Blog*) </en/reports/country-report-KEN-2020.html> accessed 21 March 2021.

[37] April 20 2017 T, 'Counties Wage Bill to Hit Sh116bn by June This Year' (*Business Daily*) <https://www.businessdailyafrica.comhttps://www.businessdailyafrica.com/bd/economy/counties-wage-bill-to-hit-sh116bn-by-june-this-year-2148440> accessed 21 March 2021.

as medical care and education.[38] While the wage bill has reduced from 57.33% of revenue in 2013/2014 to 48.1% in 2018/2019 as a result of revenue growth and initiatives by the Salaries and Remuneration Commission in collaboration with stakeholders, the same remains a problem in the country especially in light of the ever increasing external public borrowing by the government to meet the budgetary deficits.[39] It has also been documented in an economic survey 2020 indicating that there was an overall growth in public sector employment of about 2.6% in 2019 compared to 1.2% in 2018, where counties are the third-largest employer in the public sector after the Teachers Service Commission, and Ministries and other extra-budgetary institutions. Counties' employment level rose from 131.9 thousand jobs in 2013 to 190 thousand jobs in 2019 translating to the highest employment rate of 7.63%.[40]

The effect of this is reduced socio-economic development despite the massive financial allocations to county governments. This ultimately affects the country's ability to achieve sustainable development goals by the projected year 2030.

c. Ethnic and Divisive Politics in Kenya

While before 2007-2008, Kenya was among the few African countries that for a long period of time had enjoyed significant stability and peace, this changed after the elections and there has been some efforts meant to secure this stability again.[41] Sustainable development goals seek to, among other things, build peaceful societies for all, hence making peace an important ingredient of development.[42] It has rightly been observed that the perception

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[38] Salaries and Remuneration Commission, "Press Statement: National Wage Bill Conference On Transforming Kenya's Economy Through A Fiscally Sustainable Public Wage Bill"< https://src.go.ke/wp-content/uploads/2019/11/National-Wage-Bill-Conference19_11_2019.pdf> accessed 21 March 2021.

[39] Ibid; 'Kenya Finance Minister Arrest Shines Light on Infrastructure Debt' (*The Africa Report.com*, 23 July 2019) <https://www.theafricareport.com/15545/kenya-finance-minister-arrest-shines-light-on-infrastructure-debt/> accessed 21 March 2021.

[40] 'Taming the Rising County Wage Bill | Expertise Global Consulting' <http://expertise.co.ke/2020/08/11/taming-the-rising-county-wage-bill/> accessed 21 March 2021.

[41] Kisaka MO and Nyadera IN, 'Ethnicity and Politics in Kenya's Turbulent Path to Democracy and Development' [2019] Sosyal Siyaset Konferansları Dergisi 159.

[42] SDG Goal 16.

that access to power by ethnic groups in Africa comes with perceived privileges that go hand in hand with political power provides an incentive for individuals and ethnic groups to seek control of the state, resulting in ethnic and divisive politics.[43] Ethnic politics also makes it difficult or impossible to bring to book those suspected of corrupt practices as they always hide behind the phrase that 'it is their tribe that is being targeted'.[44]

County governments have also been accused of ethnicity and nepotism in awarding job opportunities as well as tenders.[45] This is despite the fact that the Constitution of 2010 was supposed to mark the end of a dark past and open up a new chapter of Kenya's social, economic and political history.[46] Notably, the instrumentalization of ethnicity as the primary means of political mobilization has become an inescapable fact of political life in Kenya, negatively affecting peace and development.[47]

d. Illicit Financial Flows

The *United Nations General Assembly resolution 71/213 on Promotion of international cooperation to combat illicit financial flows in order to foster sustainable development*[48] reiterated State Parties' concern about the impact

[43] Kisaka MO and Nyadera IN, 'Ethnicity and Politics in Kenya's Turbulent Path to Democracy and Development' [2019] Sosyal Siyaset Konferansları Dergisi 159, 163.
[44] Ibid, 173.
[45] Says BM, 'Ethnic Favouritism in Kenya and Uganda's Public Sector' (*Africa at LSE*, 1 August 2019) <https://blogs.lse.ac.uk/africaatlse/2019/08/01/has-ethnic-favouritism-in-public-sector-hiring-in-kenya-and-uganda-been-exaggerated/> accessed 22 March 2021; Waweru M, 'Tribalism, Nepotism and Graft Rife in Public Jobs Recruitment » Capital News' (*Capital News*, 3 October 2016) <https://www.capitalfm.co.ke/news/2016/10/tribalism-nepotism-graft-rife-public-jobs-recruitment/> accessed 22 March 2021; Stiftung FE, 'Regional Disparities and Marginalisation in Kenya' [2012] Nairobi: Elite PrePress;
[46] Stiftung FE, 'Regional Disparities and Marginalisation in Kenya' [2012] Nairobi: Elite PrePress.
[47] Kenya Human Rights Commission, *Ethnicity And Politicization In Kenya*, May 2018, ISBN: 978-9966-100-39-9, 3 < https://www.khrc.or.ke/publications/183-ethnicity-and-politicization-in-kenya/file.html> accessed 22 March 2021.
[48] United Nations General Assembly resolution 71/213, *Promotion of international cooperation to combat illicit financial flows in order to foster sustainable development*, Resolution adopted by the General Assembly on 21December 2016[on the report of the Second Committee (A/71/461)], Seventy-first session, Agenda item17.

of Illicit Financial Flows (IFFs), in particular those caused by tax evasion and corruption, on the economic, social and political stability and development of societies.[49] The United Nations rightly observes that the socio-economic cost of corruption and illicit financial flows are massive and continues to stunt the development of all affected countries where besides draining foreign exchange reserves, reducing domestic resource mobilisation, preventing the flow of foreign direct investment, exacerbating insecurity and worsening poverty and economic inequality, IFFs also undermine the rule of law, stifle trade and worsen macro-economic conditions in the affected countries.[50] In addition, illicit financial flows also negatively impact lives as they reduce financial resources available for investment in health, education, housing, infrastructure and other critical sectors that would improve the well-being of peoples and societies; and encourage illegal activities around the world since offshore havens provide storage and access to ill-gotten wealth at short notice, thereby contributing to the erosion of trust in democratic institutions, and hampering free enterprise and fair competition.[51]

According to the UNCTAD's Report titled "*Economic Development in Africa Report 2020: Tackling Illicit Financial Flows for Sustainable Development in Africa*", curbing illicit financial flows is part of achieving SDG target 16.4 in support of peace, justice and strong institutions.[52] UNCTAD estimates that every year, an estimated $88.6 billion, equivalent to 3.7% of Africa's GDP, leaves the continent as illicit capital flight.[53] UNCTAD observes that these outflows are nearly as much as the combined total annual inflows of official development assistance, valued at $48 billion, and yearly Foreign Direct Investment, pegged at $54 billion, received by African countries – the average

[49] Ibid, Preamble.
[50] 'Promotion of International Cooperation to Combat Illicit Financial Flows' (*Africa Renewal*, 7 October 2019) <https://www.un.org/africarenewal/news/promotion-international-cooperation-combat-illicit-financial-flows> accessed 22 March 2021.
[51] Ibid.
[52] Slany A, 'Economic Development in Africa Report 2020 Tackling Illicit Financial Flows for Sustainable Development in Africa', 14 < https://unctad.org/system/files/official-document/aldcafrica2020_en.pdf> accessed 22 March 2021.
[53] 'Africa Could Gain $89 Billion Annually by Curbing Illicit Financial Flows | UNCTAD' <https://unctad.org/news/africa-could-gain-89-billion-annually-curbing-illicit-financial-flows> accessed 22 March 2021.

for 2013 to 2015.[54] It is estimated that while between 1980 and 2018, sub-Saharan Africa received nearly $2 trillion in Foreign Direct Investment (FDI) and Official Development Assistance (ODA), it emitted over $1 trillion in illicit financial flows, continually posing a development challenge to the region, as they remove domestic resources that are crucial for the continent's development.[55] IFFs thus drain capital and revenues from Africa, undermining productive capacity and Africa's prospects for achieving the Sustainable Development Goals (SDGs).[56]

Notably, Kenya is also not immune to illicit financial flows just like the rest of the African Continent.[57] Illicit financial flows from Kenya have been attributed to, inter alia, an increase in arbitrary executive powers as well as debt fueled illicit capital outflows, and government spending fueled illicit capital outflows, where part of Kenya's debt was used to finance illicit financial outflows by the ruling elites.[58]

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[54] Ibid.

[55] Madden P, 'New Trends in Illicit Financial Flows from Africa' (*Brookings*, 2 March 2020) <https://www.brookings.edu/blog/africa-in-focus/2020/03/02/new-trends-in-illicit-financial-flows-from-africa/> accessed 22 March 2021.

[56] Africa Could Gain $89 Billion Annually by Curbing Illicit Financial Flows | UNCTAD' <https://unctad.org/news/africa-could-gain-89-billion-annually-curbing-illicit-financial-flows> accessed 22 March 2021.

[57] ENACTAfrica.org, 'Is Kenya Really Tackling Illicit Financial Flows?' (*ENACT Africa*, 25 April 2019) <https://enactafrica.org/research/trend-reports/is-kenya-really-tackling-illicit-financial-flows> accessed 22 March 2021; Institute of Economic Affairs, 'Why Reduction of Illicit Financial Flows that Fuels South Sudan's War Economy is in Kenya and Uganda's Interest', IEA Kenya, April, 2019<https://www.ieakenya.or.ke/publications/bulletins/why-reduction-of-illicit-financial-flows-that-fuels-south-sudana-s-war-economy-is-in-kenya-and-ugandaa-s-interest> accessed 22 March 2021; Barasa T, 'Illicit Financial Flows in Kenya: Mapping of the Literature and Synthesis of the Evidence'.

[58] Bank AD, 'Working Paper 275 - Illicit Financial Flows and Political Institutions in Kenya' (*Banque africaine de développement - Bâtir aujourd'hui, une meilleure Afrique demain*, 17 May 2019) <https://www.afdb.org/fr/documents/document/working-paper-275-illicit-financial-flows-and-political-institutions-in-kenya-97151> accessed 22 March 2021.

e. Over-Reliance on Foreign Debts

While it has been argued that a dramatic change in the global landscape of development finance has occurred since the turn of the century, with domestic public revenues rising rapidly to about $5.5 trillion to become the largest source of finance, while domestic private resources have quadrupled to reach about $4 trillion,[59] for most African countries, there seems to a growing over-reliance on foreign development loans from China and elsewhere,[60] also called Official Development Assistance(ODA) as aid given by governments and development agencies to support the social, economic, environmental and political development of developing countries.[61] Kenya has not been left behind and indeed it is rated among African countries with the highest recorded foreign debts to China and other countries.[62] As at November 2020, Kenya's domestic debt stood at Kshs. 3,482,653.56 Million while the external debt stood at Kshs. 3,771,808.47 Million, both totaling to Kshs. 7,254,462.03 Million.[63]

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[59] Yamada K, 'Financing Sustainable Development with Enhanced Domestic Resource Mobilization: Transitional Role of International Cooperation' (2017) 23 Asia-Pacific Development Journal 61, at 63.

[60] Dahir AL, 'Chinese Lending to African Countries Jumped Tenfold in the Last Five Years' (*Quartz*) <https://qz.com/africa/1463948/chinese-lending-to-african-countries-jumped-tenfold-in-the-last-five-years/> accessed 9 March 2021; Sun Y, 'China's Aid to Africa: Monster or Messiah?' (*Brookings*, 30 November 1AD) <https://www.brookings.edu/opinions/chinas-aid-to-africa-monster-or-messiah/> accessed 9 March 2021; Sun Y, 'China and Africa's Debt: Yes to Relief, No to Blanket Forgiveness' (*Brookings*, 20 April 2020) <https://www.brookings.edu/blog/africa-in-focus/2020/04/20/china-and-africas-debt-yes-to-relief-no-to-blanket-forgiveness/> accessed 9 March 2021.

[61] Chongo G, Mwansa S and Mulenga C, 'Resource Mobilization for Sustainable Development: Best Practices', 7< https://core.ac.uk/download/pdf/335024745.pdf> accessed 9 March 2021.

[62] 'Africa Needs More than G20 Offers to Address Looming Debt Crisis | Business and Economy News | Al Jazeera' <https://www.aljazeera.com/economy/2020/11/19/africa-faces-debt-crisis-needs-more-help-than-what-g20-offers> accessed 9 March 2021; 'China and Kenya in Talks about Debt Challenges' (*The Africa Report.com*, 22 January 2021) <https://www.theafricareport.com/60569/china-and-kenya-in-talks-about-debt-challenges/> accessed 9 March 2021;

[63] 'Public Debt | CBK' <https://www.centralbank.go.ke/public-debt/> accessed 9 March 2021.

There is a need to review the government policies on foreign debts as these are likely to be counterproductive as far as the long-term development goals of the country are concerned.

4. Strengthening Domestic Resource Mobilization for Sustainable Development in Kenya: Way Forward

The unveiling of the Sustainable Development Goals (SDGs) in 2015 meant that most developing countries would have to step up their efforts to raise domestic resources to finance needed domestic investment as support from development partners and private sector investors would not be enough.[64]

While there are various external mechanisms of funding that are available to countries for exploitation, there is a need for countries such as Kenya to enhance their domestic resources mobilization mechanisms. Indeed, this is acknowledged by the UNCTAD which points out that 'strengthening domestic public resource mobilization is crucial for Governments in financing national sustainable development strategies and implementing Agenda 2030 for Sustainable Development and the Addis Ababa Action Agenda. In addition, the particular role of fiscal revenues in public resource mobilization lies in their greater stability and predictability compared to other sources of long-term finance. According to International Monetary Fund (IMF) estimates, for low-income countries, average domestic taxes would have to increase by about 5 percentage points if they were to meet the SDGs in five key areas (education, health, roads, electricity, and water), with the financing needed in sub-Saharan Africa being larger given their development level.[65] It is also worth pointing out that investment in human, social, and physical capital, are at the core of sustainable and inclusive growth and represent an important share of national budgets—specifically, education, health, roads, electricity, and water and sanitation.[66] IMF estimates that

[64] 'Heightening Domestic Resource Mobilization in Africa During COVID-19' (*Center For Global Development*) <https://www.cgdev.org/blog/heightening-domestic-resource-mobilization-africa-during-covid-19> accessed 22 March 2021.
[65] 'Heightening Domestic Resource Mobilization in Africa During COVID-19' (*Center For Global Development*) <https://www.cgdev.org/blog/heightening-domestic-resource-mobilization-africa-during-covid-19> accessed 22 March 2021.
[66] 'Fiscal Policy and Development : Human, Social, and Physical Investments for the SDGs' (*IMF*)

delivering on the SDG agenda will require additional spending in 2030 of US$0.5 trillion for low-income developing countries and US$2.1 trillion for emerging market economies.[67] To achieve this, IMF points out that countries themselves own the responsibility for achieving the SDGs, especially through reforms to foster sustainable and inclusive growth that will in turn generate the tax revenue needed, and their efforts should focus on strengthening macroeconomic management, combating corruption and improving governance, strengthening transparency and accountability, and fostering enabling business environments.[68]

i. Combating Corruption

Arguably, domestic revenues can lead to improved development only if they are translated into productive and beneficial public expenditure.[69] Thus, it is not only revenue collection that is important but also revenue expenditure. There is a need to strengthen institutions charged with combating corruption as well as strengthening the oversight measures across all sectors in order to prevent corruption.[70] This is because corruption elimination cannot be a one-institution affair. It must involve all stakeholders of good will as well as political good will from all governance institutions in both public and private sectors. This is the only way to not only ensure that revenues or development resources are raised but are also well utilized towards achieving development goals and empowering citizens to be productive and meaningful participants in the development agenda.

<https://www.imf.org/en/Publications/Staff-Discussion-Notes/Issues/2019/01/18/Fiscal-Policy-and-Development-Human-Social-and-Physical-Investments-for-the-SDGs-46444> accessed 22 March 2021.

[67] Ibid, 5.

[68] Ibid.

[69] Junquera-Varela RF and others, *Strengthening Domestic Resource Mobilization: Moving from Theory to Practice in Low-and Middle-Income Countries* (The World Bank 2017), 1.

[70] Bank W, *Helping Countries Combat Corruption: The Role of the World Bank* (World Bank Washington, DC 1997).

ii. Capacity-Building in Revenue Collection and Management

It has been argued that increasing tax revenues in low-income countries is essential to address future development finance requirements.[71] It has been argued that under different conditions, the policies and reforms associated with aid may increase revenue, through promoting growth, encouraging more efficient tax structures, or supporting reforms to tax administration.[72]

Some of the ways through which the World Bank Group is seeking to help developing countries in Sub-Saharan Africa mobilize domestic resources fairly and efficiently include: focusing on administering value-added taxes, removing cost-ineffective tax expenditures, increasing excise taxation, improving property taxation, and closing international tax loopholes for multinationals and wealthy individuals.[73] This is because Sub-Saharan Africa remains the region with the largest number of economies below the minimum desirable tax-to-GDP ratio of 15%.[74]

Mobilizing tax revenue is considered to be key if developing countries are to finance the investments in human capital, health and infrastructure necessary to achieve the World Bank Group's goals of ending extreme poverty and boosting shared prosperity by 2030.[75] The World Bank observes that relatively low tax collections in the Sub-Saharan Africa region reflect weaknesses in revenue management, including widespread tax exemptions, corruption, and

[71] Oliver Morrissey, 'Aid and Domestic Resource Mobilization with a Focus on Sub-Saharan Africa' (2015) 31 Oxford Review of Economic Policy 447.
[72] Ibid.
[73] 'Mobilizing Tax Resources to Boost Growth and Prosperity in Sub-Saharan Africa' (*World Bank*) <https://www.worldbank.org/en/results/2019/09/09/mobilizing-tax-resources-to-boost-growth-and-prosperity-in-sub-saharan-africa> accessed 22 March 2021.
[74] Ibid; 'Why Tax Collection Remains a Challenge in Sub-Saharan Africa' <https://www.ey.com/en_gl/tax/why-tax-collection-remains-a-challenge-in-sub-saharan-africa> accessed 24 March 2021.
[75] 'Mobilizing Tax Resources to Boost Growth and Prosperity in Sub-Saharan Africa' (*World Bank*) <https://www.worldbank.org/en/results/2019/09/09/mobilizing-tax-resources-to-boost-growth-and-prosperity-in-sub-saharan-africa> accessed 22 March 2021; 'Do Sub-Saharan African Countries Need a Home-Grown Tax System?' <https://blogs.worldbank.org/africacan/do-sub-saharan-african-countries-need-home-grown-tax-system> accessed 24 March 2021.

shortfalls in the capacity of tax and customs administrations.[76] It proposes that most African economies can mobilize more in taxes through: better tax administration (including value-added taxes); broadening the tax base by removing cost-ineffective tax expenditures; increasing excise taxes (including on alcohol, tobacco, and soft drinks); introducing efficient carbon-pricing policies and effective property taxation while and closing international tax loopholes that permit aggressive tax avoidance and evasion by multinationals and wealthy individuals; and reducing structural bottlenecks to improve revenue outcomes; improving taxpayers' trust; and by moving tax administrations to the digital frontier.[77]

Kenya has been taking some steps towards moving tax administration to the digital frontier through such steps as the i-tax platform as well as the introduction of the Digital Service Tax (DST) (that is, Digital Service Tax and Value Added Tax on Digital Marketplace Supply), tax payable on income (gross transaction value) derived or accrued in Kenya from services offered through a digital marketplace.[78] While some key issues have been raised in relation to such measures as the digital service tax,[79] it is a commendable step towards increasing domestic resource mobilization which will hopefully move the country towards reducing its over-reliance on external debts to finance the budget. Notably, the introduction of digital services tax in Kenya follows in the footsteps of such countries as France, India, Singapore, United Kingdom,

[76] 'Mobilizing Tax Resources to Boost Growth and Prosperity in Sub-Saharan Africa' (*World Bank*) <https://www.worldbank.org/en/results/2019/09/09/mobilizing-tax-resources-to-boost-growth-and-prosperity-in-sub-saharan-africa> accessed 22 March 2021.

[77] 'Mobilizing Tax Resources to Boost Growth and Prosperity in Sub-Saharan Africa' (*World Bank*) <https://www.worldbank.org/en/results/2019/09/09/mobilizing-tax-resources-to-boost-growth-and-prosperity-in-sub-saharan-africa> accessed 22 March 2021.

[78]'Digital Service Tax (DST) - KRA' <https://kra.go.ke/en/helping-tax-payers/faqs/digital-service-tax-dst> accessed 22 March 2021; see also Value-Added Tax (Digital Marketplace Supply) Regulations, 2020, Legal Notice No 207; Finance Act 2020, Laws of Kenya.

[79] November 23 2020 M, 'How the New Digital Tax Will Affect Business' (*Business Daily*) <https://www.businessdailyafrica.com/bd/lifestyle/personal-finance/how-the-new-digital-tax-will-affect-business--3206500> accessed 22 March 2021.

among others.[80] The Tax authorities in Kenya may also need to work more towards looping in the informal economy into the tax payment bracket in order to increase its annual collection.[81]

However, tax measures ought to take into account the rising cost of living and the government should thus make efforts towards ensuring that tax on basic commodities does not affect the poor so much but also continually work towards creating job opportunities for the sake of raising purchasing power as well as having a bigger number of citizens affording and paying taxes.[82]

iii. Trade and Investment for Domestic Resource Mobilization

The 2030 Agenda for Sustainable Development acknowledges that international trade is an engine for inclusive economic growth and poverty reduction, and an important means to achieve the SDGs.[83]

There is a need for increases in long-term and high-quality investments which the United Nations argues will lead to a sustainable rise in economic growth, with additional public and private investment and financing required to meet

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[80] 'Digital Services Tax – A Necessary Evil? - Tax - Worldwide' <https://www.mondaq.com/withholding-tax/1008654/digital-services-tax-a-necessary-evil-> accessed 24 March 2021; 'INSIGHT: Kenya—Taxation of the Digital Economy' <https://news.bloombergtax.com/daily-tax-report-international/insight-kenya-taxation-of-the-digital-economy> accessed 24 March 2021; 'Can Digital Taxes Help Fund the Covid-19 Recovery in Emerging Markets?' (*Oxford Business Group*, 24 June 2020) <https://oxfordbusinessgroup.com/news/can-digital-taxes-help-fund-covid-19-recovery-emerging-markets> accessed 24 March 2021.

[81] Ndaka AK, 'Informal Sector and Taxation in Kenya: Causes and Effects' (2017) 1 International Journal of Law, Humanities and Social Science 77; Bigsten A, Kimuyu P and Lundvall K, 'What to Do with the Informal Sector?' (2004) 22 Development Policy Review 701.

[82] See 'A Taxing Problem: How to Ensure the Poor and Vulnerable Don't Shoulder the Cost of the COVID-19 Crisis' (UN News, 12 July 2020) <https://news.un.org/en/story/2020/07/1068111> accessed 22 March 2021.

[83] 'Trade and the Sustainable Development Goals (SDGs) | UNCTAD' <https://unctad.org/topic/trade-analysis/trade-and-SDGs> accessed 22 March 2021; 'Addis Ababa Action Agenda: Sustainable Development Knowledge Platform' <https://sustainabledevelopment.un.org/index.php?page=view&type=400&nr=2051&menu=35> accessed 22 March 2021.

the large investment needs associated with the SDGs, particularly in infrastructure.[84]

iv. Cooperation between National and County Governments

It is worth pointing out that the role of subnational governments in mobilizing revenue as well as in spending on service provision should be part of the broad domestic resource mobilization agenda.[85]The Constitution of Kenya, 2010 provides for a system of devolved government wherein each of the 47 county governments is required to work closely with the National Government in resource mobilization and service provision.[86]

There is need to address the corruption issues, huge wage bill as well as working with the private sector in growing the investments portfolio to create job opportunities and put the allocated funds to proper use. The *Public Private Partnerships Act, 2013*[87] which was enacted to provide for the participation of the private sector in the financing, construction, development, operation, or maintenance of infrastructure or development projects of the Government through concession or other contractual arrangements; the establishment of the institutions to regulate, monitor and supervise the implementation of project agreements on infrastructure or development projects and for connected purposes together with other Government initiatives and measures such as the Government Support Measures Policy Document 2018[88] can go a long way in creating the necessary framework in boosting active participation of the private sector in domestic resource mobilization for the realization of the

[84] United Nations, 'Financing For development: Progress And Prospects', *Report of the Inter-agency Task Force on Financing for Development 2017*, United Nations publication Sales no. E.17.I.5ISBN 978 -92-1-101363 – 4< https://developmentfinance.un.org/sites/developmentfinance.un.org/files/Report_IATF-2017.pdf> accessed 8 March 2021.

[85] Junquera-Varela RF and others, *Strengthening Domestic Resource Mobilization: Moving from Theory to Practice in Low-and Middle-Income Countries* (The World Bank 2017), 2.

[86] Constitution of Kenya 2010, Fourth Schedule.

[87] Public Private Partnerships Act, No. 15 of 2013, Laws of Kenya.

[88] Republic of Kenya, *Policy on the Issuance of Government Support Measures In Support Of Investment Programmes*, October, 2018 < http://ntnt.treasury.go.ke/wp-content/uploads/2021/03/Government-Support-Measures-Policy-Final.pdf> accessed 8 March 2021.

sustainable development goals and Kenya's Vision 2030 blueprint.[89] While the public sector remains the dominant funding and financing source of social investment, there is potential for additional private capital flows into SDG sectors, provided there is greater clarity on invested assets and project incentives.[90]

5. Conclusion

The need for mobilization of domestic resources (both human and material) especially in developing countries has been made more important by the increasing difficulty in accessing foreign resources due to the global financial crisis.[91] However, it has also been observed that the global financial crisis will affect the capacity of the public sector to mobilize tax revenues if it affects the incomes of residents or has an impact on trade with outsiders which will affect trade taxes.[92] Notably, SDG 17.1 captures the common agreement that domestic resource mobilization is essential to steering the economy toward those goals and to generating the necessary resources to meet them.[93]

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[89] Jomo, K. S., Chowdhury, A., Sharma, K., & Platz, D., 'Public-Private Partnerships and the 2030 Agenda for Sustainable Development: Fit for Purpose?' DESA Working Paper No. 148ST/ESA/2016/DWP/148, February 2016; 'The Growing Trend of Public Private Partnerships in Kenya | Primerus' <https://www.primerus.com/business-law-articles/the-growing-trend-of-public-private-partnerships-in-kenya090814.htm> accessed 24 March 2021.

[90] Zhan JX and Santos-Paulino AU, 'Investing in the Sustainable Development Goals: Mobilization, Channeling, and Impact' (2021) 4 Journal of International Business Policy 166.

[91] Aryeetey E, 'The Global Financial Crisis and Domestic Resource Mobilization in Africa' [2009] Organization for Economic Co-operation and Development.

[92] Ibid, 2.

[93] UNCTAD, 'UNCTAD DGFF2016 SDG Goal 17.1 - Domestic Resource Mobilization' (*UNCTAD DGFF 2016*) <https://stats.unctad.org/Dgff2016/partnership/goal17/target_17_1.html> accessed 24 March 2021; '17.1 Strengthen Domestic Resource Mobilization, Including through International Support to Developing Countries to Improve Domestic Capacity for Tax and Other Revenue Collection – Indicators and a Monitoring Framework' <https://indicators.report/targets/17-1/> accessed 24 March 2021;

The IMF considers domestic resources as the largest untapped source of financing to fund national development plans.[94] Arguably, the Global Goals can only be met if countries work together, where international investments and support is needed to ensure innovative technological development, fair trade and market access, especially for developing countries.[95] It has been argued that domestic resource mobilization will be crucial not only to meet the sheer scale of investment needed to implement the 2030 Agenda for Sustainable Development and the Sustainable Development Goals (SDGs), but also because it holds its own broader promise for transformative change.[96] It is imperative that Kenya moves towards raising its development resources internally and minimize its reliance on foreign financing of its economy, if it is to truly achieve its development goals towards realisation of the SDGs. While this may take time and may require international support as envisaged under SDG Goal 17, there is a need for the country to actively work towards achieving real financial freedom through domestic resource mobilization. Effective Resource Mobilization is indeed key to the attainment of Sustainable Development in Kenya.

[94] 'Tax Policy for Domestic Resource Mobilization | ADB Knowledge Event Repository' <https://events.development.asia/learning-events/tax-policy-domestic-resource-mobilization> accessed 24 March 2021.

[95] 'Goal 17: Partnerships for the Goals' (The Global Goals) <https://www.globalgoals.org/17-partnerships-for-the-goals> accessed 8 March 2021.

[96] 'Mobilizing Domestic Resources for Sustainable Development: Toward a Progressive Fiscal Contract | United Nations ILibrary' <https://www.un-ilibrary.org/content/books/9789210601023c009> accessed 24 March 2021.

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Laudato Si - The human roots of ecological crisis, a case of Kenya

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Abstract

If the earth is a gift, then perhaps human beings are not the primary owners since they find themselves in it. Perhaps they are just meant to be stewards. As it follows, man humanises the earth to make it habitable to him and his offspring. The consequences of these acts of creating a home for themselves is part of the reason Pope Francis wrote 'Laudato si'.

This study is a reflection of Pope Francis's encyclical, Laudato si with a focus on 'the human roots of the ecological crisis' a case of Kenya. The question to ask is 'what has been the role of the person in contributing to the challenges facing our common home – Mother earth'? The first part looks at the problems facing the earth as expressed by Pope Francis and as applied to the Kenyan scenario. The second part delves into the human roots that causes the ecological crisis. The third investigates the considerations made by the Pope as proposed way out and a conclusion. An analysis of the contents in Laudato si and other texts forms a basis of the reflection.

1. Introduction

The United Nations Environment Programme (UNEP) predicts that half the world's population growth in the next 30 years will be in Africa[1]. This growth does come up with a host of issues that arise as a result of arguably having too many people with limited resources. This increased numbers may be planned or unplanned and can be as a result of congestion in one place, or poor house planning forcing many people in one area.

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[1] United Nations, Department of Economic and Social Affairs, Population Division (2015). Population 2030: Demographic challenges and opportunities for sustainable development planning (ST/ESA/SER.A/389).

In Pope Francis' Encyclical *Laudato Si* he radically states that "the present world system is certainly unsustainable" (LS, 61).[2] Written in May 2015, *Laudato si* is one of Pope Francis's encyclical that subtitles as 'Care of our Common Home' presented to the world just before the Paris Conference on Climate Change December 2015. The Paris Climate Change Conference was tasked to set the world on a path to address the greatest challenge to ever face humankind, by adopting a new climate agreement[3]. In order to achieve the common goal, the Paris Climate Agreement's language called for more collaboration in terms of parties taking action to implement and support, others in policy approaches to those in conversation and sustainable management of places like forests. The conference affirmed urgency to save the environment.[4] In *Laudato si,* Francis makes a wakeup call to the whole world, to all humanity to help them comprehend the gradual destruction man has caused the environment and his fellows that is manifesting itself currently in a most radical way that is harmful to man and the entire biodiversity.

Laudato Si has been read worldwide, with as much compliments as criticisms. Theologians, philosophers, political leaders, conservationists, educators; the young, mature and old each with something to take home, something to action or something to question.

One may quickly summarise the document as just addressing man's effect on the environment, but a deeper look and thought indicates other causes ranging from a theological, philosophical to a political and socio-cultural perspectives. As O'Neil explains, the Encyclicals contribution to public discourse is significant from mainly three world views; from a theological approach, the believers can connect their faith convictions with the environment; a philosophical perspective directs to the importance of anthropology and ethics in a scientific debate; a socio-political approach with deals with matters such as public policy, international relations and dominance by hegemons[5]. These

[2] Francis, Pope. "Laudato si." *Vatican City: Vatican Press, May* 24 (2015): w2.
[3] Savaresi, Annalisa. "The Paris Agreement: a new beginning?" Journal of Energy & Natural Resources Law 34, no. 1 (2016): 16-26.
[4] Davenport, Coral, Justin Gillis, Sewell Chan, and Melissa Eddy. "Inside the Paris climate deal." *New York Times* 12 (2015): 15.
[5] O'Neill, Eoin. "The Pope and the environment: Towards an integral ecology?" Environmental Politics 25, no. 4 (2016): 749-754.

threaten man's relationship to nature and to the other in totally diverse circumstance.

Francis has clearly laid down his appeal 'the urgent challenge to protect our common home includes a concern to bring the whole human family together to seek a sustainable and integral development for it is known that things can change (LS, 13). And true to the word, things have changed. The environment is constantly changing. He adds "I urgently appeal for a new dialogue about how we are shaping the future of our planet. We need a conversation which includes everyone since the environmental challenges we are undergoing, and its human roots, concern and affect us all (LS,14)". O'Neil summarises by stating that an 'underlying discourse can be described as "a recurring call for individuals to take responsibility, for civic groups to maintain political pressure, and for interdisciplinary dialogue about a more ethical and equitable way forward".[6]

In this study, the author delves into the human roots of ecological crisis in Kenya, clearly laid down in the first three chapters of *Laudato Si*. In addition, there is great reference to Wangari Maathai (1940-2011). She was the founder of the Green Belt Movement and the 2004 Nobel Peace Prize Laureate. In its citation, the Norwegian Nobel Committee noted Professor Maathai's contribution to "sustainable development, democracy and peace."[7]

2. An overview of *Laudato si*

The title *'Laudato Si, mi Signore',* comes from the canticle of Saint Francis – 'Praise be to you my Lord'. This encyclical sets a theme for a lengthy addition to the social teaching of the church. In a synthesised summary, it encompasses the statement that 'things, all things, are worth.' They have worth, and since they exist, they are real. Perhaps thus, it follows that things should be treated in a particular way.

What is highlighted clearly in the encyclical is that the human beings misguided free actions have led to destruction of the environment. Therein,

[6] O'Neill, Eoin. "The Pope and the environment: Towards an integral ecology?" Environmental Politics 25, no. 4 (2016): 749-754.

[7]Maathai, Wangari. https://www.nobelpeaceprize.org/Prize-winners/Prizewinner-documentation/Wangari-Maathai

Pope Francis brings in the question of Ethics, as man's free actions are usually done in full knowledge employing his reason and ability to choose.

Elsewhere, Pope Francis addresses anthropocentrism as a big issue, stating that there is an excess focus on man and what he can do to the exclusion of other aspects of life and environment. Thus, the intrinsic dignity of the world is threatened by man thinking he is above creation.

He further adds that integral ecology has an anthropological element. This is the recognition of each person by recognising the value of each person. – Intellect, Will and Freedom. There is therefore an urgent need to acknowledge the human capacity and the relationship to his/her surroundings, together with eco-spirituality towards a more passionate concern for the protection of the world. Closely intertwined with this chapter is the recognition of the meaning and purpose of all human dignity which is manifested in the need and right to work for growth, human development and personal fulfilment for economy.

In sum, the book is split into six chapters that address the (1) the problem in our common home; (2) the view from the Creator's perspective and the people's understanding; (3) the root of the problem – which Pope Francis asserts that they are human based, (4) the bigger picture – referring to integral ecology; (5) proposes a plan of action and (6) explains a way forward embedded in ecological education.

In Kenya, Wangari Maathai's book on *'Replenishing the Earth Spiritual Values for Healing Ourselves and the World'*[8], written in 2010, five years before Francis's encyclical, and a year before she died (2011), embodies what Francis would later state in the encyclical. In fact, quite a lot of similarities and analogies can be deduced. Therein, Maathai states that 'It is so easy, in our modern world, to feel disconnected from the physical earth. Despite dire warnings and escalating concern over the state of our planet, many people feel out of touch with the natural world.'. Perhaps humanity is in touch with superficiality, a world which man has created, making him detached from reality, from the physical earth.

[8] Maathai, Wangari. *Replenishing the earth: Spiritual values for healing ourselves and the world*. Image, 2010.

3. Fundamental problems in 'our common home' – a reflection on Kenya

The things Francis highlights that are happening to our common home are not only happening in the world over, but also hereon the African continent, Kenya being one of the country's most hit. These problems as highlighted in chapter one of *Laudato Si* include; pollution and climate change, the issue of water, loss of biodiversity, decline in the quality of human life and the breakdown of society, global inequality, weak responses and a variety of opinions.

3.1. Pollution and climate change

On this issue of pollution and climate change, Pope Francis is clear on how the two are intertwined. He reiterates that climate change is for the common good, since climate itself, is a common good belonging to all and meant for all. (LS, 23). He further explains how pollution affects the environment, and to a great extent, the climate.

In Kenya, pollution is high, and increasingly so, if no action is taken. Pollution originates from waste proceeding from households, institutions, hospitals and even industries. In 2017, a research on the issue of pollution in Nairobi river reveals that pollution can be a result of either geological or anthropogenic processes. Further, heavy metals released due to geological processes such as rock weathering and volcanic eruptions are discharged into water bodies via run off, erosion, and floods[9]. Various other studies in Pakistan[10], Kosovo[11] and Turkey[12] have shown the extent to which pollution can be damaging.

[9] Njuguna, Samwel Maina, Xue Yan, Robert Wahiti Gituru, Qingfeng Wang, and Jun Wang. "Assessment of macrophyte, heavy metal, and nutrient concentrations in the water of the Nairobi River, Kenya." *Environmental monitoring and assessment* 189, no. 9 (2017): 1-14.

[10] Khan, Kifayatullah, Yonglong Lu, Hizbullah Khan, Shahida Zakir, Sardar Khan, Akbar Ali Khan, Luo Wei, and Tieyu Wang. "Health risks associated with heavy metals in the drinking water of Swat, northern Pakistan." *Journal of Environmental Sciences* 25, no. 10 (2013): 2003-2013.

[11] Ferati, Flora, Mihone Kerolli-Mustafa, and Arjana Kraja-Ylli. "Assessment of heavy metal contamination in water and sediments of Trepça and Sitnica rivers, Kosovo, using pollution indicators and multivariate cluster analysis." Environmental monitoring and assessment 187, no. 6 (2015): 1-15.

[12] Varol, Memet, and Bülent Şen. "Assessment of nutrient and heavy metal contamination in surface water and sediments of the upper Tigris River, Turkey." *Catena* 92 (2012): 1-10.

Essentially, these studies indicate that anthropogenic activities such as leaching of fertilizers, improper industrial effluent disposal, accidental oil spillage, domestic sewerage, minerals mining, and rain water contaminated with heavy metals in the atmosphere are thought to significantly contribute to aquatic ecosystem pollution.

One of the key pollutants in Kenya has been the polythene material especially plastic commonly in form of packaging and carrier bags. In a research done in 2005 by the UNEP and the GoK, more than 4000 tons of these bags are produced in Kenya monthly and half of them end up into the solid waste stream.[13] In 2004, while Maathai, as an assistant Minister of Environment, she was quoted saying that plastic bags provide several million habitats for mosquitoes to breed that increase the risk of malaria.[14] Malaria as a tropical disease remains a menace in Kenya and if one travels in some sections of Kisumu and Homa Bay counties, it is clearly indicated on notice boards *'you are now in a Malaria zone'.* For many years, Nairobi city has had no malaria except through mosquitoes who 'travel' from out of city by night buses especially.

Other parts of the world have had to deal with the issue of plastic bags pollution too. In fact, far from being an issue of visual pollution, plastic bag waste is associated with numerous environmental problems. In a study done in Hong Kong in 1994 by Gordon, four issues emanating from the use and disposal of plastic bags that apply to Kenya are explored. First, plastic wastes block gutters and drains, creating serious storm water problems. Bangladesh, for instance, in a report by the Environment Protection and Heritage Council (EPHC) imposed a ban on plastic bags in March 2002 following flooding caused by blockage of drains[15]. In comparison to Kenya; first, roads flood all the time because of clogged drainages. Second, consumption of plastic bags

[13] United Nations Environmental Programme and Government of Kenya (UNEP/GOK). Selection, Design, Implementation of Economic Instruments in the Kenyan Solid Waste Management Sector, Nairobi. 2005

[14] AFP. Awash in plastic, Kenya urged to ban Ximsy shopping bags. Available from: Agence France Presse (AFP). 2005, accessed on February 23, 2021

[15] EPHC. Plastic shopping bags in Australia. National Plastic Bags Working Group Report to the National Packing Covenant Council. Environment Protection and Heritage Council (EPHC), Australia. 2002

by livestock can lead to death. Growing up in the rural area over 20yrs ago, seeing a plastic paper on the ground where cattle grazed was an abomination. Third, plastic bags are non-biodegradable, as such, their presence in agricultural fields decreases soil productivity. Fourth, when burned, plastic bags release toxic gases such as furan and dioxin, and leave unhealthy residues that include lead and cadmium.[16]

To solve the issue of plastic bags in Kenya and elsewhere will require a concerted effort of the leaders and ruling administration of the day. For the Kenyan scenario, Njeru in 2006 demonstrated that Nairobi's plastic bag waste is socio-spatially uneven and its associated environmental problems and the lack of accountability by producers constitute a serious environmental injustice. He additionally stated that the waste scenario is an outcome of intricately intertwined political, economic, and cultural processes and associated power relationships.[17]

The United Nations Environmental Programme and Government of Kenya jointly agree that the issue of plastic bags was aggravated because plastic bags for many years were given either free or inexpensive, they have been widely used in business as packaging material across the country. [18]

Issue of water

Water is life. This statement is timely and alive in the encyclical *Laudato si*. Pope Francis affirms the fact that fresh drinking water is an essential natural resource that ensures life and sustainability of flora and fauna, and higher animals in the hierarchy of being such as man. (LS, 27). A study done in 2013 between Kenya and Ethiopia on '*Small independent water providers*', reveals that deprivations in water and sanitation lie at the core of poverty.[19] Organisms

[16] Ng, Gordon TL. "A sustainable approach to plastic bag waste management in Hong Kong." J. Resour. Manage. Technol. 22, no. 3 (1994): 158-165.

[17] Njeru, Jeremia. "The urban political ecology of plastic bag waste problem in Nairobi, Kenya." Geoforum 37, no. 6 (2006): 1046-1058.

[18] United Nations Environmental Programme and Government of Kenya (UNEP/GOK). Selection, Design, Implementation of Economic Instruments in the Kenyan Solid Waste Management Sector, Nairobi. 2005

[19] Ayalew, Mulugeta, Jonathan Chenoweth, Rosalind Malcolm, Yacob Mulugetta, Lorna Grace Okotto, and Stephen Pedley. "Small independent water providers: Their

and man can live longer without food; however, this is not the same with water which is a critical component for replenishing body fluids lost through physiological processes.[20] Moreover, toxins in the body can only be removed by water.[21]

Lots of programs to sort out the issue of water in Kenya are on the rise. This is as much in the rural as in the city. In rural Kenya, not so long ago, water was fetched from clean running streams. People from villages would say *'we are going to the river'*. A wise man would direct the water using a bamboo stick so as to facilitate the harvesting. Women, men and children as well as domestic animals would benefit from such water. It was mainly mineral water. Those days are in the past now. In modern times, it is common to find this natural water contaminated by a wide range of organic, inorganic and biological pollutants as stated by Chinedu, in a study done in 2011.[22]

In the present times, due to technology, a good number of homes have tap water, which is now considered safer as opposed to the stream or river water that was considered to have contained natural minerals, a vital health component.

3.2. Loss of biodiversity

Pope Francis does not mince his words in laying the blame on human activity for the loss of biodiversity. And because of that loss, Pope Francis continues 'thousands of species will no longer give glory to God by their very existence, nor convey their message to us. (LS, 33). He is correct in this assessment of

position in the regulatory framework for the supply of water in Kenya and Ethiopia." *Journal of Environmental Law* 26, no. 1 (2014): 105-128.

[20] Igwe, Ogbonnaya, Ekundayo Joseph Adepehin, and Jemima Omonigho Adepehin. "Integrated geochemical and microbiological approach to water quality assessment: case study of the Enyigba metallogenic province, South-eastern Nigeria." Environmental Earth Sciences 74, no. 4 (2015): 3251-3262.

[21] Olyaie, Ehsan, Hossein Banejad, Kwok-Wing Chau, and Assefa M. Melesse. "A comparison of various artificial intelligence approaches performance for estimating suspended sediment load of river systems: a case study in United States." *Environmental monitoring and assessment* 187, no. 4 (2015): 1-22.

[22] Chinedu, Shalom Nwodo, Obinna Nwinyi, Adetayo Y. Oluwadamisi, and Vivienne N. Eze. "Assessment of water quality in Canaanland, Ota, southwest Nigeria." *Agriculture and Biology Journal of North America* 2, no. 4 (2011): 577-583.

biodiversity loss, including paying attention to the less well-recognized species that are an integral part of ecosystem functioning. He is also aware of the need to care not just for the conservation of basic resources of soil, water, and air, but considers the welfare of animal populations as well through the creation of biological corridors. Conservationists will welcome this message, even if important debates on ecological restoration and translocation of species under threat of extinction are not included.

In her book 'unbowed'[23], Maathai narrates how when she was growing up as a young girl in Nyeri, there was a remarkable fig tree, immense; there were streams with clean and fresh water which they would drink from directly. There were crops planted along the stream including arrowroots, banana plants and sugarcane which formed part of food for the villagers. Years later, upon her return from studies, she noticed the fig tree had been cut, someone had acquired the land for commercial use. The rivers that would rush down now had silt – that is soil erosion. Indigenous trees replaced by exotic ones, and trees cut down replaced by cash crops – tea and coffee plants. She quotes 'Ironically, the area where the fig tree of my childhood once stood always remained a patch of bare ground where nothing grew. It was as if the land rejected anything but the fig tree itself...'[24]

When there is pollution, the life in water is also affected. It is believed by many people that rain is a blessing. The reverse is true. It can also be a curse because excess rains can be disastrous. Wet weather may dilute pollutant concentration while hot and dry weather may result in a high concentration. For instance, as concerns Nairobi river in Nairobi Kenya, macrophytes at designated areas along the river were also identified to investigate Nairobi River self-purification mechanism.[25]

[23] Maathai, Wangari W. "Unbowed." (2006).

[24] Wangari Maathai, « Unbowed », *Field Actions Science Reports* [Online], Special Issue 7 | 2013, Online since 08 October 2012, connection on 20 April 2021. URL: http://journals.openedition.org/factsreports/2124

[25] Njuguna, Samwel Maina, Xue Yan, Robert Wahiti Gituru, Qingfeng Wang, and Jun Wang. "Assessment of macrophyte, heavy metal, and nutrient concentrations in the water of the Nairobi River, Kenya." *Environmental monitoring and assessment* 189, no. 9 (2017): 1-14.

The weather as observed twenty years ago has gradually changed, and is no longer predictable. In the near past rains, hot spells, dry seasons and cold periods were predictable. For instance, in Western Kenya, planting season for maize was generally in April and harvesting in August. December to February was generally hot [26]. This was in tandem with short or long rains. Now one has to carefully be on the alert.

When Rachel Carson wrote the 'Silent Spring', to warn the world of the effects of insecticides, as an air pollutant and as a killer of 'life', upon which other lives depend; her warning was that pesticides were dangerous to human health in the end proposing that human beings could pick alternatives if they were to deal with massive insects in the air[27].

3.3. Quality of life

It is arguable that the quality of human life has declined. This is a paradox because as it is, with advancement in science and technology it would have followed that the quality of human life improves, and this has a lot of supporting facts, such as the mere transition of use of coal to electricity. On the other hand, it becomes interesting to interrogate the fact that 'material things in plenty', do not necessarily improve lives or bring happiness. The issue of quality of life is as old. Scholars as late as 70s were already discussing these issues and offering solutions, that currently seem similar, so much so that one wonders if something if at all, has been done.

Ingwe (2008) states that "the high rate of urbanization…has not resulted in improved living standards (better paying jobs, infrastructure and services, clean and modern electricity, portable water and so forth). Increasing urbanization of the developing world has created a large mass of urban poor".[28]

[26] Place, Frank, Jemimah Njuki, Festus Murithi, and Fridah Mugo. "Agricultural enterprise and land management in the highlands of Kenya." *Strategies for sustainable land management in the East African highlands* (2006): 191-215.
[27] Carson, Rachel. "Silent spring. 1962." (2009).
[28] Ingwe, Richard, Eugene J. Aniah, and Judith Otu. "Lagos, Nigeria: Sustainable energy technologies for an emerging African megacity." In *Urban Energy Transition*, pp. 631-645. Elsevier, 2008.

Quality of life (QOL), according to Britannica, is the degree to which an individual is healthy, comfortable, and able to participate in or enjoy life events.[29] The reason for this definition is the inclusion of health, comfort and enjoyment of life, a definition seemingly radically different from the one of the World Health Organization (WHO) which defines QOL as "an individual's perception of their position in life in the context of the culture and value systems in which they live and in relation to their goals, expectations, standards and concerns"[30]

Quality of Life can be perceived oscillating from subjective to objective factors. I a 2006 research by Mcrea and others state that quality of life is a multifaceted term that incorporates such notions as a good life, valued life, satisfying life, and happy life.[31] In a modern scientific use, the quality of life is furthermore a broad-band concept encompassing material and social conditions, individual ambitions, experiences and evaluations, which often lead to confusion in the theoretical foundation and operationalization of empirical research. Originating in classical philosophy with its good life question with philosophers such as Aristoteles or Stoa, the concept is linked with Bentham's utilitarianism underlining individual decisions leading to joyful consequences[32].

There are many indicators of a quality of life propounded by various scholars throughout time. One approach, called engaged theory, outlined in the journal of *Applied Research in the Quality of Life*, posits four domains in assessing quality of life: ecology, economics, politics and culture.[33] Elsewhere, other

[29]Jenkinson, Crispin. "Quality of life". *Encyclopedia Britannica*, 6 May. 2020, https://www.britannica.com/topic/quality-of-life. Accessed 10 March 2021.

[30] World Health Organization. "WHOQOL: measuring quality of life: World Health Organization." (2019).

[31]McCrea, Rod, Tung-Kai Shyy, and Robert Stimson. "What is the strength of the link between objective and subjective indicators of urban quality of life?." *Applied research in quality of life* 1, no. 1 (2006): 79-96.

[32] Haslauer, Eva, Elizabeth C. Delmelle, Alexander Keul, Thomas Blaschke, and Thomas Prinz. "Comparing subjective and objective quality of life criteria: A case study of green space and public transport in Vienna, Austria." *Social Indicators Research* 124, no. 3 (2015): 911-927.

[33] Magee, Liam, Andy Scerri, and Paul James. "Measuring social sustainability: A community-centred approach." *Applied Research in Quality of Life* 7, no. 3 (2012): 239-261.

studies indicate that standard indicators of the quality of life include wealth, employment, the environment, physical and mental health, education, recreation and leisure time, social belonging, religious beliefs, safety, security and freedom[34]

A study done on 'air quality and road transport' in 2014 indicate that in emerging and developing economies the rapid convergence of people on cities supplies human resources which contribute to potential economic growth but also intensifies the strain on already vulnerable resources such as land, water, housing and other infrastructure such as transport. This impacts quality of life in terms of congestion, accidents on roads and pollution. Transport is the greatest contributor to urban air pollution with highest levels of exposure and pollution at roadside locations.[35] In some cities such as Japan, Austria and parts of the United States, transport facilities are of higher quality and are well-coordinated in terms of time management that one does not need to own a personal car. And even if a person or family owns one, they do not need to use it as frequently.

A statement from the United Nations sums all the key contributors to social and environmental unsustainability found in cities "In many cities in developed and developing countries alike, congestion, pollution, shifting economic centres and demographic patterns present imminent threats to lives and livelihoods. The transport landscape in urban agglomerations is often highly inequitable, with poor and disabled people left with inadequate means to access the economic and social centres of the cities. The burden of climate change adds another layer of urgency and complexity to the problems decision makers must address in their quest to create sustainable cities." [36]

[34] Sirgy, M. Joseph. "A Quality-of-Life Theory Derived from Maslow's Developmental Perspective: 'Quality'Is Related to Progressive Satisfaction of a Hierarchy of Needs, Lower Order and Higher." *American journal of Economics and Sociology* 45, no. 3 (1986): 329-342.

[35] Hitchcock, Guy, Beth Conlan, Duncan Kay, Charlotte Brannigan, and D. Newman. "Air quality and road transport: impacts and solutions." (2014).

[36] Ki-Moon, Ban. "Mobilizing Sustainable Transport for Development." *United Nation Official Publication: New York, NY, USA* (2016)

3.4. Global inequality

International inequality refers to the idea of inequality between countries. This can be compared to global inequality which is inequality between people across countries[37]. This is manifested through various practices such as the international economy, international law, treaties and conventions, international trade. Equality of persons cannot be attained as an individual is unique in themselves. However, in other aspects of the persons being, equality can be attained. In 2020, as stipulated in the World Social Report[38], by the United Nations these includes areas like the (1) economy encompassing job opportunities, wealth distribution, non-exploitation of natural resources, money markets etc. (2) Inequality of opportunity (3) inequality in the application of justice.

The World report further states that inequality in a rapidly changing world comes as we confront the harsh realities of a profoundly unequal global landscape, noting that income disparities and a lack of opportunities are creating a vicious cycle of inequality, frustration and discontent across generations.

In some parts of the world, divides along the lines of identity are becoming more articulated. In the interim, gaps in newer areas, such as access to online and mobile technologies, are emerging. Except if progress speeds up, the principle promises of the 2030 Agenda for Sustainable Development, *"to leave no one behind",* will remain a still distant goal by 2030. The disparity challenge is worldwide, and closely interconnected to other major problems of our times.

3.5. Weak responses and a variety of opinions

Sometimes the frustration experienced in Kenya is lack of decisiveness, which may imply a weak response to an important issue. A country like Kenya, needs a grand strategy that will guide its activities and take it out of the narrative of 'weak responses' to a 'variety of options'. This encourages focus. To have a

[37] Garcia, Frank J. "Globalization, inequality & international economic law." *Religions* 8, no. 5 (2017): 78.

[38] United Nations: Department of Economic and Social Affairs, Social Inclusion. UNDESA World Social Report 2020. https://www.un.org/development/desa/dspd/world-social-report/2020-2.html. 2020

grand strategy is to have a plan that is holistic, complete and vast in all ways. These grand plans are held and sought after by the most significant levels of a state primarily to shield the public interests. In the event that public interests are well safeguarded, they give a stage to outer projection in international relations, international strategy and foreign policies. For each country, a grand methodology is required particularly in crises, yet with a more drawn long-term projection. Currently, it can be said for Kenya, that this is 'that particular time', when a grand strategy is extremely necessary. [39]

4. Human roots of ecological crisis

In this chapter, Pope Francis summarises the human roots of the ecological crisis (LS 101 – 136). This he does in three categories; firstly, by indicating the link between technology, creativity and power; secondly, by demonstrating how the technocratic paradigm has been globalized and the ever-changing meaning and application of techno science and thirdly, the crisis and effects of anthropocentrism. The main question that begs is; 'What role does the human being play in advancing the ecological crisis?'

But first, what is ecology? McIntosh states that ecology is a relatively new science, first introduced by German biologist and philosopher E. H. Haeckel (1834–1919).[40] Going back historically, the term is derived from the Greek word for home *(oikos)* and so strikes an explicit resonance with the subtitle of Francis's 2015 encyclical *Laudato Si'*. On Care for Our Common Home. However, the meaning of ecology in the narrower, biological sense refers to the interrelationship between different organisms and their natural environment, otherwise described as "niches."[41] Pope Francis acknowledges human origins of ecological crisis. He proposes its focus on the dominant technocratic paradigms and the place of human beings and human action in the world. The 'roots' highlighted here are perhaps beyond the technology and techno science aforementioned.

[39] Maingi, Caroline Shisubili. "A Grand Strategy for Kenya is Timely–Lessons from Elizabeth." Journal of Conflict Management and Sustainable Development, Vol 5, (1), 2020

[40] McIntosh, Robert P. *The background of ecology: concept and theory*. Cambridge University Press, 1986.

[41] Deane-Drummond, Celia. "Laudato Si'and the natural sciences: An assessment of possibilities and limits." *Theological Studies* 77, no. 2 (2016): 392-415.

4.1. Technology, creativity and power

In the last two centuries, the world has experienced an enormous wave of change through technology. Technology has almost ushered in a new era, the automated and digitalized one. As a result, Francis, making reference to his predecessor Benedict states that man has been impelled to gradually overcome material limitations[42]. In a sense, technology has remedied countries in terms of medicine, engineering and communication not excluding transportation (LS, 102, pg. 60). Quoting his predecessor John Paull II, Francis states that 'Science and technology are wonderful products of a God-given human creativity'[43]

Immediately though, Pope Francis states that technological products are not neutral, they create a fragmentation which ends up moulding ways of life and forming social prospects along the lines dictated by the interests of certain powerful groups. Decisions which may appear to be simply instrumental are in all actuality decisions about the sort of society we need to fabricate.

When it comes to techno science, one cannot but fathom the beauty that is showcased from the final products such as skyscrapers, bridges - state of the art infrastructure. Pope Francis states that 'in the beauty intended by the one who uses new technical instruments and in the contemplation of such beauty, a quantum leap occurs, resulting in a fulfilment which is uniquely human', (LS, 103, pg.60). Only the human being can contemplate this beauty.

Whatever amount of the ills of innovation and technology, the gains are enormous, all the more so in this period when the entire world is dealing with a pandemic (LS, 107). Travel has been limited with meetings being aided by means of different kinds of 'media' e.g., zoom, teams, skype etc. so forth Colleges needed to on-board online for kept learning. Universities had to on-board online for continued learning. A research done on the 'Impact of information technology innovation on firm performance in Kenya' reveals that technology innovation influences firm performance positively. The study

[42]VERITATE, CARITAS IN. "Encyclical Letter" Caritas in Veritate." (2009). 702

[43] Paul II, Pope John. "Address to Scientists and Representatives of the United Nations University." *Apostolic Journey to Pakistan, Philippines I, Guam (United States of America II), Japan, Anchorage (United States Of America II), Hiroshima, Japan* (1981): 16-27.

recommends that entrepreneurs should develop innovative strategies to actualize firm performance.[44]

However, on eLearning in institutions, the results indicate otherwise… since the institutions are still transitioning, technology has posed a challenge though there is a way to counter this. That is to say that the degree to which they hinder the implementation and provision of e-Learning varies from one institution to the other. According to the e-Learning Africa Report[45]; in Kenya the following challenges to e-Learning rank high in this order: limited bandwidth, lack of appropriate ICT training, lack of priority in ICT funding, ICT sustainability and pressures due to poverty. However, each of the identified challenge presents an improvement area in eLearning and as such need to be addressed.[46]

Looking at the health care industry, the use of technology for public health surveillance in Kenya may have its challenges, but the opportunities supersede the challenges. [47] There is no evidence indicating that there have been studies conducted in Kenya or sub-Saharan Africa to explore the use of mobile learning technology among undergraduate medical students or its challenges. However, there are numerous studies on mHealth innovations within sub-Saharan Africa that have been conducted and completed with positive outcomes. All indicating that use of mobile technology will continue to develop. Therefore, it's imperative that medical schools incorporate ML into medical education, otherwise there would be a looming risk of producing health care workers who are under-prepared to utilize mHealth technology fully.[48]

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[44] Chege, Samwel Macharia, Daoping Wang, and Shaldon Leparan Suntu. "Impact of information technology innovation on firm performance in Kenya." *Information Technology for Development* 26, no. 2 (2020): 316-345.

[45] Isaacs, Shafika, and David Hollow. "The eLearning Africa 2012 Report." Germany: ICWE (2012).

[46] Kibuku, Rachael Njeri, Daniel Orwa Ochieng, and Agnes Nduku Wausi. "e-Learning Challenges Faced by Universities in Kenya: A Literature Review." *Electronic Journal of e-Learning* 18, no. 2 (2020): pp150-161.

[47] Njeru, Ian, David Kareko, Ngina Kisangau, Daniel Langat, Nzisa Liku, George Owiso, Samantha Dolan et al. "Use of technology for public health surveillance reporting: opportunities, challenges and lessons learnt from Kenya." *BMC Public Health* 20, no. 1 (2020): 1-11.

[48] Masika, Moses Muia, Gregory Barnabas Omondi, Dennis Simiyu Natembeya, Ephraim Mwatha Mugane, Kefa Ogonyo Bosire, and Isaac Ongubo Kibwage. "Use of

Hannah Arendt has something to say about the basis of creativity. She states that man, by the nature of his very being, is a novelty.[49] There is no other like him. For this reason, he has something new to add to this world, be in in form of ideas or a tangible item. Creativity is from within human person, and it has either been positive and negative. Pope Francis here, emphasises on both. Due to man's creativity, he has managed to humanize his surroundings. In Kenya, many institutions channel out many creations of its members, students or otherwise.

In matters innovation, since the launch of MPesa application in 2007, a mobile money transfer service, it has offered access to banking services and its safe quick and cheap method to provide financial services as it increases economic activities in poor areas hence advancing their living standards and opportunities[50].

Due to the pandemic, new ideas such as of online shopping sprouted, online marketing etc…, now blended learning. These innovations were created out of necessity, can we be innovative about the environment as well? A human being, at the natural, sensitive and rational experiences of their being, seeing and understanding the degradation before them, surely can come up with something novel.

With great power, comes great responsibility. It is a period when humanity has such great power, yet both inherently and exteriorly, yet no one can guarantee how responsible he can use it. Nothing or no one ensures he will use it responsibly. Pope Francis quotes the writings of Guardini on '*The End of Modern World.*'. Guardini wonders if an increase in power is in tandem with increase in progress (LS, 105). He further states that because the technological development has not been accompanied by development in

mobile learning technology among final year medical students in Kenya." *Pan African Medical Journal* 21, no. 1 (2015).

[49] Cooper, Leroy A. "Hannah Arendt's political philosophy: An interpretation." *The Review of Politics* 38, no. 2 (1976): 145-176.

[50] Ngugi, Benjamin, Matthew Pelowski, and Javier Gordon Ogembo. "M-pesa: A case study of the critical early adopters' role in the rapid adoption of mobile money banking in Kenya." *The Electronic Journal of Information Systems in Developing Countries* 43, no. 1 (2010): 1-16.

human responsibility, values and conscience; the contemporary man has not been trained to use power… he has a meagre awareness of his own limitations[51]. Guardini states that modern anthropocentrism has paradoxically ended up prizing technical thought over reality, since "the technological mind sees nature as an insensate order, as a cold body of facts, as a mere 'given', as an object of utility, as raw material to be hammered into useful shape; it views the cosmos similarly as a mere 'space' into which objects can be thrown with complete indifference".[52]

Human beings must always remember that they are not autonomous (LS, 105). Pope Francis states that human being's freedom has been handed over to the blind forces of the unconscious, of immediate needs, of self-interest and of violence. This is characteristic of the situation in Kenya in the recent times. The commoner is in a space where he is unable to think as such. The power in control is from elsewhere. Radically though, the power withheld by certain people is ever increasing with no way to control it.

Human beings have the tendency to extract everything they lay their hands on (LS, 106), ignoring what lies ahead, and the future of humanity that relies on it. This has led to depletion of natural resources. Continuous activity in mines, on rivers, on forests has been a disaster. Effects in the Mau and Karura forests in Kenya cannot be ignored as can be seen in patterns of rains, soil erosion and disorganisation of the order of wild life. In earlier epochs and up to till recently, as much as the human being constantly intervened in nature, he was in tune with it, and respected the possibilities of the things in themselves. Human beings and material objects should extend a friendly hand to each other, instead of it becoming confrontational, or with lots of tension.

There is a general diminished sense of decision making on the part of the person (LS, 108). In this point, Pope Francis brings out the idea of absolute power 'corrupting completely'. He puts it in a way that it emanates from Technology… that even culture is held together by technology, and if one is not savvy, then it becomes difficult because it been oriented to depend on

[51] Guardini, Romano. *The end of the modern world*. Isi Books, 1998. Pg. 82.
[52] Hollowell, Anthony. *Ratio in Relatione: The Function of Structural Paradigms and Their Influence on Rational Choice and the Search for Truth*. Wipf and Stock Publishers, 2020.

it…dominating, and excluding internal logic. He continues that it becomes countercultural to choose activities whose goals are not or are partly depended on technology – especially in these times of the pandemic…countries have even already thought of a 'digital tax'. Guardini summarises that as a result, 'man seizes to hold on the naked elements of both nature and human nature.[53]

There is an experience of economic and political tensions in terms bottom lines and maximization of profits, as well as hegemons dominance (LS, 109). This is an old problem of almost all business undertakings focusing on profits without worrying about the needs of the people. On the negatives, GMO and effects, WMD, Biological weapon, addition to the screens etc. With creativity, comes power… power to own and dominate that which you have created… unfortunately, this tends more towards negativity.

4.2. On human life

One can easily wonder why the issue of abortion is being discussed here. It seems so disconnected and far-fetched from the matter at hand. The first thing is to wonder how abortion as a concept and an activity relates to the matter at hand. Yet Pope Francis makes a concrete connection. Pope Francis states that if there is no value for human life as such, it becomes very difficult to value other forms of life, as the human life making reference to Aristotle, is higher in the hierarchy of being. [54] Quoting the encyclical letter '*Caritas in Veritate'*, Pope Francis adds that if personal and social sensitivity to accepting new life is lost, it follows that other acceptance to other forms of life will slowly wither away.[55]

This is also emphasised under issues of life (LS, 113). As Wangari Maathai put it, mountains, forests, oceans etc. by themselves may not be holy, but the life sustaining they do deserve attention. From that perspective, the environment is sacred just like life is sacred. This is because, to destroy what is essential to life is to destroy life itself.

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[53] Guardini, Romano. *The end of the modern world*. Isi Books, 1998. Pg. 82.

[54] Dicastery for Laity family and life. Pope Francis: "Every human life has an inestimable value" http://www.laityfamilylife.va/content/laityfamilylife/en/news/2020/papa-francesco--ogni-vita-umana-ha-un-valore-inestimabile.html. 25 March 2020

[55] VERITATE, CARITAS IN. "Encyclical Letter" Caritas in Veritate." (2009).

4.3. Anthropocentrism

The anthropocentrism narrative purposes that the human is superior and entitled. Human nature can be perceived in two radical ways. Negatively where man is seen as selfish, aggressive and competitive as opined by Hobbes and the other positively where human nature is perceived as godlike, ingenious, special and unique. These extremes views, left on their own have serious pitfalls. Too much of either becomes distractive. As it may follow, the two major ills of anthropocentrism include (1) the inability to discern one's limitations; where does the human being stop? And (2) the increased blind sidedness to the loss of the planet's richness and beauty. Putting the human first and the need for self-gratification has led to the ecological crisis.

The radicalistic nature of this encyclical is that Pope Francis opposes anthropocentrism, (LS, 122). He states that there has to be found an equilibrium between man as being part of nature, and man as perceived above creation because of mainly his rational nature. Pope Francis reiterates that anthropocentrism is manifested in selfishness in the way human beings treat life, not caring for the unborn as such, not caring or the elderly as such and many others in the vulnerable category. He concludes by stating that renewal of nature is greatly tied to renewal of the person.

6. Projections on addressing the challenges

'Our common home'. How did it happen that this earth human being belongs to, is a 'given'? How did it happen that human beings act entitled to it and have even decided to divide it among themselves? … Yet human being found themselves on earth; they form a part of it? At what point did some people decide that some land, some space, some island belongs to them? If one were to interrogate the principle of the 'the universal destination of goods', does a person really own anything? In the real sense though, this world does not belong to anyone, yet, this is man's dominant human attitude toward nature and animals. It would be wrong to think of the natural world as existing solely to serve human beings. The earth should be looked at as having value for its own sake.

Wangari Maathai states that individuals within communities have to rediscover their authentic voice and speak out on behalf of their rights that include human, environmental, civic and political. This can be done in a more

progressive democratic processes.[56] The relationship between human being and the earth is symbiotic. In the process of working to make better the earthy, man helps himself. Human beings come in handy to avert soil erosion, to sustain biodiversity, plant trees for rains to prevent protracted drought. Paradoxically though, at the end of human life, a human being is either cremated, ashes stored or spread to the world; or is buried in a very small space.

A few pointers on projections to way forward can be discussed in the following ways. First could be through a change of lifestyle. During this time of the pandemic, can human beings think of developing a new lifestyle? A lifestyle that favours the environment? A lifestyle that uses less, saves and cares for the basics to avoid depletion? The lifestyle that should be promoted should not prejudice the future. One may not be able to predict the future human needs with any precision, but can be sure that any future human development will require resources and life sustaining systems. Therefore, measures taken to minimize human impact on resources and damage to the ecosystem need support from the social fabric. Second way could be through a re-education on matter of the environment, especially embarking on new paths for authentic freedom; to think through the fact that freedom is not absolute; that the human being needs to foster harmony with oneself and with others, with nature and other living creatures. Third way could be to re-enact the key role the family plays in the society, first as a school of virtue. Teaching and learning about the care of 'our common home' begins in the family for example not littering or helping the growth in solidarity and being responsible. Fourth could be the awareness of our communion with other creatures and finally, fifth as learning to appreciate beauty in nature.

The aforementioned projections can be achieved through a reflection on the following; (a) consider doing away with obsession that everything surrounds the human being who is domineering, that one's needs are more important than others. Pope Francis points out that activities such as human trafficking or selling human organs are tied to putting individual needs before others, what he terms as 'practical relativism.' (b) Consider the need for a mental and a

[56] Maathai, Wangari. *Replenishing the earth: Spiritual values for healing ourselves and the world*. Image, 2010.

cultural shift, from being individual to incorporating community; what Pope Francis terms as 'a non-anthropocentric approach'. (c) Consider the need to protect employment, which also directly gives value and dignity of human person as it is tied to work. Dignity of work gives meaning to other aspects of human life, therefore one's work should not distinguish the ability to transcend. Finally, (d) Consider the marginalised especially women, children, the poor and old. There is an urgent need to protect environment for the poor who will be affected by the new biological technologies, new scientific research and genetic manipulation. Pope Francis calls for a non-separation of science and ethics.

6. Conclusion

As much as the encyclical is acclaimed as a cry to reclaim and protect earth, it is evident that it is more of a call for human beings to check their activities in the environment their impact. When Wangari Maathai speaks of replenishing the earth, it resonates with Pope Francis call for the human being to take responsibility of the environment in addressing the ecological roots to the depletion, degradation and exploitation.

Humans have a responsibility, a duty of posterity towards the future generations. Human beings should be held morally responsible for their actions since they are capable of having, knowledge of the consequences of those actions. They have the capacity to bring about these consequences and can choose to do otherwise, since these consequences have value significance. Individuals in communities need to rediscover their authentic voice, and speak out in case of a call to the leadership or authority. Here, the solutions to the problems are beyond individual – they extend to the political, the socio-cultural and even religion.

As a result of a consciousness possessed by the human being, they have a capacity to know and appreciate beauty, creativity and innovation, or grieve over the lack thereof. Just like children marvelling at a blossoming flower, or a sprouting maize, human beings as a reaction to the natural world, can inspire a sense of wonder and beauty that in turn encourages a sense of the divine.[57]

[57] Maathai, Wangari. *Replenishing the earth: Spiritual values for healing ourselves and the world*. Image, 2010.

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Reflections on the Structure and Leadership of the Senior Bar in Kenya: Some Thoughts

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1. Introduction

The prestigious rank of Senior Counsel in Kenya's legal profession is an enviable one. Having regard to the privileges accorded to the recipients of this award and the respect they command, both junior and senior advocates desire to attain such rank. However, the award is a preserve of those who have attained a mark of excellence in the legal profession, having distinguished themselves as legal practitioners and made significant contribution to the development of the legal profession in Kenya. The honorary accolade attracts general public importance because it is rationalized as a trademark of quality for the consumers of legal services.[1] Besides, the highly sought after pre-eminent award attracts individual gravity since it offers a quantum leap in the amount of legal fees charged by the bearer.[2]

The award targets advocates with a right of audience in superior courts, exemplary in advocacy in those higher courts, and who have demonstrated the stipulated competencies to a standard of excellence.[3] This calls for an appointment process that serves the public interest by offering a fair and transparent means of identifying excellence in advocacy in the higher courts, rigorously and objectively providing for the identification of the very best

[1] Lord Chancellor, Lord Falconer of Thoroton's written statement announcing his decision to retain the rank of Queen's Counsel: HC Deb vol 661 WS54 dated 26 May 2004 cited in Michael Blackwell, Taking silk: an empirical study of the award of Queen's Counsel status 1981-2015,
(2015) LSE Research Online, p 1
<http://eprints.lse.ac.uk/62942/1/__lse.ac.uk_storage_LIBRARY_Secondary_libfile_shared_repository_Content_Blackwell,%20Michael_Taking%20silk_Blackwell_Taking%20silk_2015.pdf> (Accessed on 17 May 2020).

[2] The Law Society, 'The Law Society's response to the consultation paper on 'Constitutional reform: the future of Queen's Counsel' published by the Department for Constitutional Affairs'
(2003) p 8
<https://webarchive.nationalarchives.gov.uk/20040722104904/http://www.dca.gov.uk/cons ult/qcfuture/responses/qc312.pdf

[3] Jenny Crewe Consulting Ltd, Queen's Counsel Appointments: assessment process validation (2018) p 4 <http://www.qcappointments.org/wp-content/uploads/2018/12/External-Validation-Report-2018.pdf> (Accessed on 17 May 2020).

advocates, and ultimately promoting fairness, excellence and diversity.[4] Meaning, the process should be free of unjustified discrimination claims in favour of some ethnic groups, unpredictable nomination process, sentimentalism and norms.[5] However, despite the benefits that flow from this near-perfect rank, questions have been raised regarding its validity[6]; transparency of the nomination process; the benefits the bearers of the accolade enjoy; the impact the bearers have on the society; and the interplay between the legal profession and politics. Most importantly, why is it that the Senior Bar has no legitimate leadership structure?

[4] Queen's Counsel Competition for England and Wales 2019 Guidance for Applicants, p 1 <http://www.qcappointments.org/wp-content/uploads/2019/05/Final-Guidance-to-Applicants-2019.pdf> (Accessed on 17 May 2020).

[5]See e.g., Donald B. Kipkorir's letter to the Attorney General, Hon Justice Kihara Kariuki dated 23 September 2019, seeking a response and/or advise on, inter alia, whether the nominating committee in arriving at its decision restricted itself to the criteria set out in the Advocates (Senior Counsel Conferment and Privilege) Rules, 2011; whether the Committee had a matrix that was applied to all; the weighting process; composition of the Committee; discrimination against truly commercial law firms in favour of criminal law litigators; etc.

[6] The word validity as used in this case means inferences which can be reasonably drawn by stakeholders about the process given its aims. For instance, what is the applicants' confidence level as far as fair treatment of all applicants is concerned? Besides, how confident are the other members of the legal profession that the people appointed as Senior Counsel have the right competencies? The issues raised in this context include;

a). Cognitive validity: what are the aims of the pre-nomination assessment? Have those objectives been achieved?
b). **Context validity**: Can the nomination process be said to be fair and transparent? Have the applicants from the marginalized sectors in the society been considered? Does the selection panel reflect the face of the wider legal profession?
b)**Scoring validity**: How are the scores weighted? How reliable is the scoring and decision-making process? Does the Committee have a matrix that it applies to all?
c) **Test taker characteristics**: Do other applicants have an unfair advantage over the other applicants? Do these factors relate to an individual's capacity to perform the functions of a particular role? If the discrimination is permissible, is the same communicated to all applicants before their commencement of their individual applications?

This paper adopts both the doctrinal and comparative methodology to assess if some of these questions are well founded, and if so, propose reforms to ensure that the highly admired rank retains the reverence it deserves. This it does by first establishing the evolution of the legal profession in Kenya, a historical overview of the rank of Senior Counsel and how the first Senior Counsel were nominated. Secondly, the paper will analyse the legal framework governing the rank of Senior Counsel in Kenya and evaluate whether the set criteria are wholesomely met. The paper will then compare the Kenyan model to the United Kingdom's (UK) and Nigeria's in a bid to draw lessons from the UK's and Nigeria's appointment process and leadership structure. The final part of the paper will summarise the research findings, tentatively recommending reforms that should be considered to ensure the continued existence of the Rank of Senior Counsel meets its objectives.

2 Evolution of The Legal Profession in Kenya

The history of legal education can be traced back to the pre-colonial period and it developed as follows:

a) Pre-colonial period which embodied the traditional set up of communities before the colonization;
b) As a colony whereby legal education entailed various developments through ordinances that were enacted; and
c) Post-independence period when legal education entailed development through Acts of Parliament.

2.1 Pre-colonial Legal Education

Legal education during this period was based solely on customs. It was ethno-centric with its jurisdiction limited to the geographical boundaries of each ethnic community. Teachers of the law included kings, chiefs, orderlies, diviners and witch doctors. Although not codified, the substantive law was binding. Legal education during this era focused on private legal issues such as marriage and inheritance.

2.2 Colonial and Post-Colonial Period

Formal legal education was introduced by the British. It had two facets: judiciary and colonial legal service. In 1901, the private legal profession was

introduced but only Indians were allowed to practice. Disciplinary issues were handled by the High Court. Entry into the profession required that the advocates had to qualify as barristers for admission to practice as advocates. Later, senior judges had the authority to license the lay who had proven to be of good character. However, this practice stopped in 1911 and practicing lawyers from other Commonwealth countries were allowed to practice. Organization within the profession began with the inception of the Mombasa Law Society, however, its membership was voluntary. With the establishment of a High Court in Nairobi and the city declared a centre of commerce and administration, legal practitioners in Nairobi also formed the Nairobi Law Society whose membership was equally voluntary. The two Law Societies merged in 1920s to form the Law Society of Kenya, whose membership is mandatory.

In 1949, the Advocates Act and the Law Society of Kenya Act were enacted. The two Acts, which are still in force till date, institutionalized the Law Society of Kenya. Several amendments have however been effected on the two Acts. In the recent past, the Council of Legal Education Act, 1995 Cap 16A (Repealed under the Legal Education Act, No, 27 of 2012, section 47) was enacted establishing the Council of Legal Education, a body which exercises general supervision and control over legal education in Kenya and offers advice to the Government in relation to all aspects thereof.[7]

3. Historical Development of the Senior Counsel Rank in Kenya

Until 2003, the status of Senior Counsel, which was cemented in the then Constitution, was unheard of. Thanks to the former Chief Justice Bernard Chunga's alleged acts of misconduct, the first nominees to this revered rank were honoured by the former President Mwai Kibaki. They were appointed in a bid to fulfil the Presidents campaign promise of performing a radical surgery as a way of cleaning up the Judiciary.[8] The then Chief Justice Bernard Chunga had been accused of corruption, interfering with judges, and planning,

[7] Council of Legal Education Act, Cap 16A, Section 6(1).

[8] Paul Ogemba, 'The race against time as lawyers fight to join exclusive club of Senior Counsel,'Standard Digital, 11 January 2018)<https://www.standardmedia.co.ke/article/2001265570/race-against-time-as-lawyers-fight-to-join-exclusive-club-of-senior-counsel> (Accessed on 17 May 2020).

condoning and carrying out torture, thus bringing the Judiciary into ridicule and disrepute by subverting the constitutional review.[9] In the event the Chief Justice was unable to exercise the functions of his office or that his conduct ought to be investigated, section 62 of the 1963 Independence Constitution required the President to appoint a tribunal consisting of a person who holds or has held the office of the Speaker of the National Assembly who shall be the chairman, two persons who hold or have held office as judges of appeal, the chairman of the Public Service Commission, and one person upon whom the rank of Senior Counsel has been conferred by the President.[10]

Given that the law required a Senior Counsel to sit in the tribunal yet there were no Senior Counsel in the country, the President had to appoint all past chairmen of the Law Society of Kenya and gazette them as Senior Counsel.[11] There were 19 recipients.[12] The Benard Chunga tribunal, being the first tribunal in the history of the country set up to probe a Chief Justice, comprised of Francis Ole Kaparo (the then House Speaker), Majid Cockar (former Chief Justice), Richard Kwach (then Court of Appeal judge), Abdullahi Sharawe (former PS and chairman of the Public Service Commission), and Gibson

[9] Njeri Rugene, 'Kibaki suspends Chunga over corruption claims,'(Daily Nation, 22 February 2003) <https://www.nation.co.ke/news/1056-294576-lprt92z/index.html (Accessed on 17 May 2020).

[10] 1963 independence Constitution of Kenya, section 62(7) and (8).

[11] Paul Ogemba, 'The race against time as lawyers fight to join exclusive club of Senior Counsel'(Standard Digital, 11 January 2018) <https://www.standardmedia.co.ke/article/2001265570/race-against-time-as-lawyers-fight-to-join-exclusive-club-of-senior-counsel> (Accessed on 17 May 2020).

[12] The first recipients of the rank of Senior Counsel were honoured by President Kibaki in 2003. They were all past Presidents of the Law Society and included: the then Attorney General Amos Wako, the then Members of Parliament Paul Muite and Mutula Kilonzo, Dr. Gibson Kamau Kuria, Dr. Willy Mutunga, George B. M. Kariuki, Nzamba Kitomba, Lee Muthoga, Fred Ojiambo, Peter Le Pelley, Achhroo Ram Kapila, Joe Kwach, Mohammed Zahir Malik, Stewart Mackenzie Thompson, Samuel Njoroge Waruhiu, Ramnik Shah, Simani Sangale and Paul Mathari Wamae. In contrast, in Australia, if the holder of the rank of Senior Counsel took office as a judicial officer of a superior court, such barrister automatically lost the title of Queen's Counsel. However, the rank could be regained only if new letters patent are issued after such judicial officer of the superior court leaves office. See Justice Cummins P.D. 'Reflections on Judicial Office' presented on 1 September 2009, p 11.

Kamau Kuria, SC (former LSK chairman who was conferred the rank of Senior Counsel prior to his conferment).[13] Bernard Chunga resigned after the tribunal had been set up.[14]

The second conferment was in June 2013 when the President conferred upon some Government officials and other former chairmen of LSK the prestigious rank.[15] The year marked a paradigm shift in the manner in which the nominations were held. The rules on nomination changed in October 2008 requiring interested senior advocates of inter alia, fifteen years standing post-admission to apply for consideration for the award. The then Attorney General Prof. Githu Muigai and Director of Public Prosecutions Keriako Tobiko were among the recipients.[16] Prof. Ojienda, Ms. Omamo, Mr. Abdullahi, Mr. Akide and Mr. Omogeni had rendered their services to the LSK as Chairpersons of the Society.[17]

The third nomination which was in 2019, attracted 90 applicants with only 24 being successful.[18] Contrary to the norm, post-2013 LSK chairpersons were

[13] Paul Ogemba, 'The race against time as lawyers fight to join exclusive club of Senior Counsel,'Standard Digital dated 11 January 2018 at https://www.standardmedia.co.ke/article/2001265570/race-against-time-as-lawyers-fight-to-join-exclusive-club-of-senior-counsel accessed on 17 May 2020

[14] BBC News, 'Kenya's Chief Justice resigns,' dated 26 February 2003 at http://news.bbc.co.uk/2/hi/africa/2800413.stm accessed on 27 September 2019

[15]Galgalo Fayo, 'Fifteen lawyers elevated to Senior Counsel position,' Business Daily dated 17 June 2013 at https://www.businessdailyafrica.com/news/Fifteen-lawyers-elevated-to-Senior-Counsel-position-/539546-1886330-eehv5qz/index.html accessed on 17 May 2020

[16]Other recipients of the award were Prof Tom Ojienda, Defence Cabinet Secretary Raychelle Omamo, the then Judicial Service Commission commissioner Ahmednasir Abdullahi, Siaya Senator James Orengo, Patricia Kameri-Mbote, Pheroze Nowrojee, Kenneth Akide, Okong'o Omogeni, Kenneth Fraser, George Oraro, Joyce Majiwa, Lucy Kambuni and Omesh Kapila

[17]Law Society of Kenya, *Senior Counsel Members* at https://lsk.or.ke/about-lsk/senior-council-members/ accessed on 17 May 2020

[18] They include the former Vice President Kalonzo Musyoka, former Minister for Justice Martha Karua, Deputy DPP Dorcas Oduor, former DPP Philip Murgor, former CEO of the defunct TJRC Patricia Nyaundi, family lawyer Judy Thongori, Prof. Albert Mumma, renowned arbitrator John Ohaga, Kioko Kilukumi, Fred Ngatia, Rautta Athiambo, Waweru Gatonye, Wilfred Nderitu, John Chigiti, Kiragu Kimani, Abdikadir Hussein Mohamed, Rarieda Constituency Member of Parliament, Hon. Dr.

not on the list of those successful for conferment. Among those successful were the former Vice President Kalonzo Musyoka, former Minister of Justice Martha Karua[19] and Member of National Assembly Hon. Dr. Otiende Amollo, [20] all of whom are advocates in active politics.[21] However, the nomination of the 24 nominees has since been recalled by the incumbent active LSK Council through a letter dated 13th May 2020, a drastic move aimed at correcting the mistake made by the Selection Committee.[22]

Otiende Amollo, Zerhabanu Janmohamed, Tail Ali Taib, Mohammed Nyaoga, Pravin Bowry, Fackson Kagwe and Parkash Nagpal.

[19] Martha Karua served as the Minister for Justice and was in office during President Kibaki's controversial re-election in 2007. She is the only candidate among the list of 24 who has openly come out to criticize the revocation of her nomination for the Rank of Senior Counsel on Twitter; *see*

[20] https://twitter.com/marthakarua/status/1261164266285039617?s=21>.

[21] Hon. Dr. Otiende Amollo is an Advocate of the High Court of Kenya who served as the Chairperson of the Commission on Administrative Justice of the Republic of Kenya between 2011 and 2017. He has also served as one of the experts in the Committee of Experts that drafted the Constitution of Kenya, 2010, Chair of the International Jurists (Kenya-Section), Chair of the Action Aid International (Kenya), Secretary General of the East African Law Society, and Council Member of the LSK. He has developed the legal profession by way of active litigation where he successfully petitioned against the presidential election of 8th August 2017, leading to a fresh presidential election on 26th October 2017. In addition, he has researched and presented on the areas of Constitutional law, theory and practice, the African Human Rights System, and on the question of HIV/AIDS and the law.

[22] The letter reads thus:

Re.:Conferment of Senior Counsel: 2019 and 2020

The Law Society of Kenya (Society) is mandated by ***Section 17*** *as read together with* ***Section 81*** *of the* ***Advocates Act, Cap 16 of the Laws of Kenya*** *to formulate rules for and recommend to the President of the Republic of Kenya, outstanding Advocates suitable for conferment of the rank and dignity of Senior Counsel.*

On 26th August, 2019, the Committee on Senior Counsel (Committee) recommended twenty-four (24) Advocates out of ninety (90) applicants for conferment of the rank and dignity of Senior Counsel. A majority of members expressed dissatisfaction in the manner of composition of the Committee and the impartiality of its members in particular, the three (3) Judges. Two cases were filed in Court challenging the decision of the Committee on various grounds. Concerns were and continue to be raised on the validity of the ***Advocates (Senior Counsel Conferment and Privileges) Rules, 2011****. The Rules are indicated to have been*

3.1 The Political Question?

In tandem with section 17(3) of the Advocates Act, Cap 16 of the Laws of Kenya, the Committee on Senior Counsel comprises three Senior Counsel elected by the Society, a Judge of the Supreme Court nominated by the Chief Justice, a Judge of the Court of Appeal nominated by Judges of the Court of Appeal, a Judge of the High Court nominated by the Kenya Magistrates and Judges Association, the Attorney General, two Advocates (elected by the Society) who shall have at least five years' experience in practice, and the

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amended twice in 2012 and 2014 without public participation. All these issues impact negatively on the process of recommendation for conferment made in 2019 and intended to be made in 2020, a call for applications in respect of which was made to members on 24th February, 2020.

The Council deliberated on this matter in a meeting held on 11th May, 2020. It was resolved that the decision of the Committee made on 26th August, 2019, be set aside. The recommendation for conferment of the twenty-four Advocates was therefore revoked. The applications for 2019 shall be considered together with those made in 2020.

To ensure good governance, integrity, transparency and accountability of future recommendations for conferment, the Council further resolved that legal opinions be sought from three (3) Advocates appointed by the Council, two (2) of which are Senior Counsel. The three (3) will advise the Council on what changes should be made in the Rules to guarantee fairness and integrity of the process. Lastly, it was resolved that the Senior Counsel should urgently consider reconstituting its leadership and membership to the Committee, in preparation for the conferment set to commence as soon as the Society elects its representatives to the Committee in an Annual General Meeting to be held in due course.

We undertake to ensure that henceforth, the conferment process meets the requirements of ***Section 17*** *of the* ***Advocates Act****,* ***The Constitution of Kenya*** *and best practice in the Commonwealth. The process should be fair and transparent. Recommendations must be made upon identifying excellency in applicants through meritocracy in a rigorous and objective exercise.*

Yours

Nelson Andayi Havi,

President, Law Society of Kenya

chairperson of the Society.[23] It considers applications made for elevation to the rank of Senior Counsel and also upon conferment, considers any application for the removal of a person from the Roll of Senior Counsel, making such recommendations to the President.[24] Despite such clarity in the composition of the Committee on Senior Counsel, little is known regarding its leadership and structure. It is rather disconcerting to note that since the appointment of the first batch of Senior Counsel, no election has ever been held to elect the leader of the Committee on Senior Counsel and its leadership structure thereof. Instead, Fred Ojiambo, SC single-handedly assumed de facto leadership and slipped into the power gap for the last seventeen years because there was no leader at the time. However, a time has come when the Committee and the Senior Bar at large need a clear structure and leadership framework to ensure that the Senior Bar retains its almost lost glory. In addition, does conferment of the award automatically exempt Senior Counsel from following the instructions of the LSK Council? In other words, can the President of the Law Society of Kenya legally summon a Senior Counsel?

4. Legal and Institutional Framework Governing the Selection of Senior Counsel in Kenya

As previously stated, the rank of Senior Counsel was a decorative provision that never saw its realization until the need to set up a Tribunal to probe the then Chief Justice arose. In the event the Chief Justice's conduct was to be

[23] **Advocates (Senior Counsel Conferment and Privileges) Rules, 2011, Rule 3(1)(e)**. The 2019 nomination process raises several issues, among them, conflict of interest on the part of the Committee members because the Chairman of the Society, who is yet to be a Senior Counsel, submitted his application for consideration of the elevation. It can be arguably deduced that the chairman of the Society has some influence on the other members of the Committee on Senior Counsel. Even if he doesn't and/or didn't, any reasonable right thinking member of the society would be tempted to imply an instance of conflict of interest on the part of the other members of the Committee.

[24] *ibid* Rule 4; In Saskatchewan, appointments to the rank of Queen's Counsel are made by a selection committee comprising the Justice Minister and Attorney General, Chief Justice of the Court of Appeal or the Chief Justice of the Court of the Queen's Bench, and former presidents of the Canadian Bar Association, Saskatchewan branch and the Law Society of Saskatchewan. *See* Saskatchewan, *Outstanding lawyers honoured with Queen's Counsel designation,* 16 December 2016 <https://www.saskatchewan.ca/government/news-and-media/2016/december/16/qc-appointments> (Accessed on 17 May 2020).

investigated, the 1963 Independence Constitution of Kenya required the President to set up a Tribunal that would inter alia investigate the veracity of the claims levelled against the then High Court Judge.[25]As a mandatory requirement, a Senior Counsel had to be a member of the Tribunal.[26]

Currently, the language of the Constitution of Kenya, 2010 does not restrict such membership of the Tribunal probing the Chief Justice to a Senior Counsel, but to as broadly a term as 'an advocate of fifteen years standing.'[27] However, article 10 of the Constitution of Kenya, 2010 gives a cemented status to national values and principles which include non-discrimination, transparency, accountability, equality, inclusiveness, and protection of the marginalized. In addition, in the spirit of Caesar's wife being above suspicion, public service ought to be conducted in a manner that it attracts high standards of professional ethics, accountability for administrative acts, transparent, fair competition and merit as the basis of appointment, representation of Kenya's diverse communities, and adequate and equal opportunities for appointment of inter alia, men, women, persons with disabilities, and members of all ethnic groups.[28] The Advocates Act, Cap 16 of the Laws of Kenya forms the legal foundation of the rank of Senior Counsel in Kenya. The Act empowers the President to grant a letter of conferment to any person of irreproachable professional conduct who has rendered exemplary service to the legal and public service in Kenya conferring upon him (or her) the rank and dignity of Senior Counsel.[29] To be eligible for such conferment, one must be duly enrolled as an advocate of the High Court with at least fifteen years' standing;

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[25] Constitution of Kenya, 1963 section 62(7).
[26] *ibid* sec 62(8)(c).
[27] *Constitution of Kenya,* 2010 article 168(5)(a)(iii).
[28] *ibid* article 232(1).
[29] Advocates Act, Cap 16, Laws of Kenya, section 17(1); *See* Barreau du Quebec, *Lawyer Emeritus Distinction* <https://web.archive.org/web/20160304053422/http://www.barreau.qc.ca/en/barreau/reconnaissance/avocats-emerites/> (Accessed on 17 May 2020) (In Quebec, the award of the honorary accolade stopped in 1975. However, three decades later, the Barreau of Quebec established the award of distinction of *Lawyer Emeritus* whose cognitive validity was to give recognition to lawyers who *"gain distinction as a result of their outstanding professional career, outstanding contribution to the profession or outstanding social and community standing that has brought honour to the legal profession."*)

or if the person is eligible to act as an advocate under section 10, they must hold, and has held for a continuous period of not less than fifteen years, one or other of the qualifications specified in section 13(1) of the Act relating to professional and academic qualifications.[30] Such grant of letter of conferment should be made within sixty days upon receipt of a list of names submitted by the Committee on Senior Counsel via the Chief Justice.[31]

Upon appending their signature on the Roll of Senior Counsel, the Chief Justice must publish in the Gazette the names of the advocates upon whom such conferment of the rank of Senior Counsel has been conferred.[32] Just like the Attorney General, the Director of Public Prosecutions and the Solicitor-General, the Senior Counsel takes precedence of other advocates.[33] As far as discipline is concerned, unlike the other advocates, a Senior Counsel faces a Disciplinary Committee of three instituted in each case by the Chief Justice.[34]The Committee of three, which is chaired by the Attorney General or Solicitor General, consists of the Attorney-General or the Solicitor General as the case may be, and two other Senior Counsel.[35] Unlike the Disciplinary Tribunal under section 57 of the Advocates Act, the Committee of three cannot have a temporary or retired member who was not re-elected but opted to remain in office pending the final determination of a complaint brought before the Tribunal before such retirement.[36]

Section 81(1)(ee)of the Advocates Act empowers the Council of the Society, upon approval of the Chief Justice, to make rules relating to the procedure for the conferment of, and the privileges attached to, the rank of Senior Counsel. In tandem with this proviso, the Council of the Law Society of Kenya, with the approval of the Chief Justice, made the Advocates (Senior Counsel Conferment and Privileges) Rules of 2011 to establish the procedural law governing such conferment. The application for conferment process involves

[30] Advocates Act, Cap 16, Laws of Kenya, section 17(2).
[31] *ibid* section 17(3).
[32] *ibid* section 18(4).
[33] *ibid* section 20.
[34]*ibid* section 19(a).
[35] *ibid*.
[36] *ibid* section 19(c).

an advertisement calling for applications that is made at least thirty days before the 31st of March in each year or on such date determined by the Committee.[37] The conferment is made upon one who, besides meeting the conditions in section 7 of the Advocates Act,[38]

a) is also an active legal practitioner and undertakes training of other members in the legal profession;
b) holds a valid practising certificate or is entitled to act as an advocate under section 10 of the Act;
c) has not been found guilty of professional misconduct by the Disciplinary Committee for a period of at least seven years preceding the application for conferment;
d) possesses sound knowledge of law and professional competence;
e) has argued at least five substantive appeals before the Supreme Court or Court of Appeal and at least ten substantive cases at the High Court within a period of ten years preceding the applicant's application for conferment, or in the case of an applicant who does not ordinarily undertake litigation, has shown outstanding performance in the area of practice of the applicant;
f) is a person of integrity, irreproachable professional conduct and good character;

has actively served the Society or other association whose membership consists of advocates; and

[37] **Advocates (Senior Counsel Conferment and Privileges) Rules of 2011, Rule 5**. Such advertisement should be published in the electronic media and sent to the members of the Law Society of Kenya, inviting the eligible and willing contestants to make applications for such conferment.

[38] In Saskatchewan, to be eligible for appointment one must be a resident of Saskatchewan and must have at least ten years post-admission experience in the superior courts of any territory of Canada, United Kingdom or Ireland. See *supra n.* 24.

has contributed to the development of the legal profession through scholarly writings and presentations.[39]

Members of the public can comment or object to any application made.[40]Irrelevant factors not to be considered by the Committee include age, tribe, gender, race, political belief or association of the applicant or any other factor constituting discrimination within the meaning of the Constitution.[41] Communication from the Committee regarding the status of the applicant should then be communicated in writing and copies of the same submitted to the Council. Such a decision cannot be appealed against except where the appeal is based on a ground of discrimination. The appeal lies in the High Court. Upon conferment, the Committee submits the list of the recommended persons to the Chief Justice within thirty days from the date of its decision, who then submits it to the President.

A Senior Counsel ceases to hold the status of Senior Counsel if a member of the Society petitions the Committee for their removal from the Roll of Senior Counsel and the Committee, upon inquiry on such removal of Senior Counsel, is of the decision that such removal should be effected and consequently

[39]Closely related to Kenya's eligibility criteria for conferment is Canada's Prince Edward Island whose eligibility for conferment is dependent on:

a) A lawyer having at least ten years' standing at the bar of Prince Edward Island;
b) Learned in the law;
c) Consistency in exhibiting highest attainable standards of professional integrity; and
d) Being in possession of very good character.

a)reputation for excellence in the legal practice;
b)Recognition as a leading lawyer;
c)Great expertise in their area of specialization;
d)Exhibit exceptional leadership qualities in the profession;
e)Performance of outstanding work in the legal arena, including legal
f)scholarship; or Contributing greatly to community issues and public service.
See Law Society of Prince Edward Island, *Honours and Awards* <http://lawsocietypei.ca/honours-awards > (Accessed on 17 May 2020).

[40]Advocates (Senior Counsel Conferment and Privileges) Rules 2011, Rule 10(1).

[41]*ibid* Rule 10(2).

communicating the same to the Chief Justice.[42] The Chief Justice effects the same by causing to be published in the Gazette a notice revoking the Conferment of the rank of Senior Counsel.[43]

The benefits the rank of Senior Counsel bestows upon the bearer are largely blurry. The law vaguely provides that other than use of designation of Senior Counsel, the rank of Senior Counsel shall bestow upon holder such other duties, powers and privileges as the Council may consider appropriate.[44] Over

[42] *ibid* Rule 15(4).
[43] *ibid* Rule 15(7).
[44] *ibid* Rule 19; In the English legal system, the Queen's Counsel status is associated with formal privileges and fees charged. The privileges include wearing a distinctive uniform wear the Queen's Counsel wear a short wig, wing collar and bands and silk gown over a special court coat. Another privilege, save for the Attorney-General or Solicitor-General and the Director of Public Prosecutor, is being accorded a formal right to address in precedence. The third privilege relates to having special and preserved seats in courts. As far as legal fees are concerned, the Queen's Counsel is allowed to charge hefty fees for the legal services they render. This is so because a Queen's Counsel is expected to specialize in certain areas that are more complex thus the higher legal fees. As Baker J.H. quips, rightly so, '…the holders benefitted financially from the valuable right to be heard in the courts before junior barristers and it is known that Francis Winnington enjoyed a tenfold increase in his professional income after becoming King's Counsel in 1672.' Another consequence of being a Queen's Counsel is that they are exempted from the "cab-rank rule".

Certain disadvantages related to the prestigious rank of Queen's Counsel include prohibition to appear in court against the Crown without a special licence. In addition, they were not to draft pleadings without the assistance of junior counsel, neither were they to appear in court without the company of a junior barrister. More restrictively, they had to establish their chambers in London. *See* All Answers Ltd, 'The Role of Queens Counsel' (Lawteacher.net, September 2019) <https://www.lawteacher.net/free-law-essays/english-legal-system/the-role-of-queens-counsel.php?vref=1> (Accessed 17 May 2020).

Besides, according to Lord Brightman, "No doubt retention of the rank (of Queen's Counsel) may enable a barrister to raise his level of fees. But it can also deprive him of his living. I know of two cases where a barrister with a flourishing junior practice applied for and was granted silk, but failed as Queen's Counsel. He thereby lost most of his junior practice, gained no worthwhile silk's practice, and the public was deprived of the services of a competent and inexpensive junior barrister. I also know of two cases where, I understand, a junior barrister applied for silk with some hesitation, m case he should be left with no practice. In both cases he overcame his

the years, the Society has been extending courtesies to the holders of the status like charging higher fees,[45] having special seats preserved for them in front of the judges,[46] putting on special robes, and precedence in court. These advantages, however well intended, have been the subject of criticisms in most jurisdictions.[47]

misgivings and reached very high judicial office. But he might have opted out, to the disadvantage of the judicial bench. To sum the matter up, the QC system in my opinion confers no benefit on the public and can be a damaging hurdle" See Brightman J, 'Response to the consultation paper on 'Constitutional reform: the future of Queen's Counsel' (UK Government Web Archive, 10 May 2003)

<https://webarchive.nationalarchives.gov.uk/20070521230000/http://www.dca.gov.uk/cons ult/qcfuture/responses/qc041.pdf> (Accessed on 17 May 2020).

[45]According to Matrix Chambers, in supra n 44,'Silks can charge a premium in the marketplace simply for being silks' because the cost assessment rules expressly recognise that and that makes the appointment to silk more enticing. See also R v. Robinson (SCTO Ref 209/97) where the Chief Taxing Master quipped thus "the acquisition of the status of QC brings with it the ability to command higher fees."

[46]A Senior Counsel sits in the front seats in courts as a recognition of their pre-eminence and in fulfilment of precedence rules in tandem with the Advocates Act, Cap 16, Laws of Kenya, section 20.

[47]For example, when responding to the 2003 consultation on whether the rank of Queen's Counsel should be abolished or not, the City of London Law Society had this to say, *"…There is clear, perceived, competitive advantage to QCs from their distinctive position in courtrooms…It is wrong in principle for advocates to be perceived in court to have a different status whether by reason of dress, position or otherwise."* *See* <https://webarchive.nationalarchives.gov.uk/20070521230000/http://www.dca.gov.uk/cons ult/qcfuture/responses/qc058.pdf>.

Others, like the Matrix Chambers, noted that "Silks are sometimes instructed simply to 'get the ear' of the judge (because some judges undoubtedly listen more attentively to submissions froma silk)." See <https://webarchive.nationalarchives.gov.uk/20070508230000/http://www.dca.gov.uk/cons ult/qcfuture/responses/qc211.pdf> p 6.

5. Comparative Study of the Conferment Process and Leadership Structure in other Jurisdictions

5.1 Eligibility Criteria for Conferment of the Rank of Queen's Counsel in the United Kingdom

There was a radical paradigm shift in 2004 to the manner in which Queen's Counsel were appointed in the United Kingdom.[48] The appointment process shifted from the pre-2005 'secret soundings'[49] to an establishment of an independent Queen's Counsel Appointment panel. The pre-2005 annual (appointment) process was considered highly nebulous and difficult to define with intricate precision. It entailed barristers submitting applications which contained very shallow information since it was confined to their biographical and financial details. Lord Mackay summarised the process thus:

> The lists of applicants are sent to the Law Lords, to all members of the Court of Appeal and to all High Court judges, as well as certain senior and specialist Circuit Judges in London and the Provinces. The list also goes to the Chairman of the Bar and the Leaders of the Circuits and specialist Bars. I ask for views from each on as many of the candidates as possible and I encourage them, where appropriate, to take discrete soundings among other leading Silks in their field… The application form contains a request for judges before whom the candidate has appeared in cases of substance over the last year, or senior members of the Bar who will be familiar with their practice and professional standing. I do not automatically approach those named…

[48] Michael Blackwell, *Taking silk: an empirical study of the award of Queen's Counsel status 1981-2015*. (2015) LSE Research Online, p 2 <http://eprints.lse.ac.uk/62942/1/__lse.ac.uk_storage_LIBRARY_Secondary_libfile_shared_repository_Content_Blackwell,%20Michael_Taking%20silk_Blackwell_Taking%20silk_2015.pdf> (Accessed on 17 May 2020).

[49] This was a system where Queen's Counsel were appointed upon advice of the Lord Chancellor who took secret soundings from judges and senior barristers. The process was criticized for lacking credibility due to lack of transparency raising concerns on the numerous instances of discrimination especially on the minorities including women, other ethnic groups, and barristers who practiced outside London.

> However, if by January, when a large number of views are to hand, there appears to be less information than is needed about a particular individual, my staff will then write to those named…[50]

What can be deduced from the process was the role the senior judicial officers played, which could, on the face of it, be seen as mere generalities. However, in reality, an applicant's good connection with the judiciary and the judicial officer's support was a key consideration for appointment as a Queen's Counsel.51[51] Other factors that determined whether or not one would be appointed as Queen's Counsel were political affiliation[52] and the need to avoid flooding the market.[53] The composition of the body of consultees also determined whether or not an applicant would be appointed.[54] As earlier on stated, the process was criticised and its credibility and validity questioned. For instance, while responding to the 2003 Government's consultation paper on whether or not to abolish the rank of Queen's Counsel, the Association of Women Barristers proffered to wit:

In its current form the selection process perpetuates discrimination against solicitors, women and ethnic minorities. The system of great weight being given to automatic judicial soundings instead of references is unacceptable and

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[50]J. Mackay, 'The myths and facts about Silk' *Counsel* (1993) p 11.
[51] Michael Blackwell *Supra n.* 48 p 5.
[52] P. Plowden 'The legal professions' in W. Cornish et al *The Oxford History of the Laws of England:*
1820-1914 (2010) vol XI 1059-1060.
[53]Director General of Fair Trading, Competition in professions (OFT, 2001) para 275 <https://webarchive.nationalarchives.gov.uk/20070508230000/http://www.dca.gov.uk/cons ult/qcfuture/responses/qc236.pdf> (Accessed on 17 May 2020).
[54] The 2003 report of the Commission for Judicial Appointments noted that "The apparent lack of diversity among Silk cannot be attributed solely to the appointment procedure… Nevertheless, there is a risk that a selection process which relies almost entirely on consultation with a body of consultees who are overwhelmingly white, male and from a narrow professional background will tend to have a 'cloning' effect which will act against increasing diversity." See Annual Report (2003) Great Britain Commission for Judicial Appointments para 4.30 and 4.31 <http://terment.ru/en/?q=Annual+report+2003+-+Great+Britain.+Commission+for+Judicial+Appointments> (Accessed on 17 May 2020).

probably in breach of the Sex Discrimination Act 1975 and European Equal Treatment Directives… The AWB considers that the manner of selection has fallen behind acceptable equal opportunities policy procedure and practice applicable in other professions and walks of life.[55]

Responding to the numerous calls for reform, the Lord Chancellor commissioned an enquiry led by Sir Leonard Peach to look into the appointment process of Queen's Counsel and judges and make recommendations as to whether or not the rank of Queen's Counsel should be abolished.56[56] The Leonard-led commission of enquiry recommended that, inter alia, a Commission for Judicial Appointments be establish to investigate allegations of 'unfairness, discrimination and maladministration in the appointment process of Queen's Counsel.'[57]The Commission found 'severe flaws in the way that the competition was administered in that year notably due to …lack of a useful audit trail.'[58] Further, the Office of Fair Trading criticised the process by noting thus:

...the appointments system…does not appear to operate as a genuine quality mark. The system is secretive and, so far as we can tell, lacks objective standards. It also lacks some of the features of a genuine accreditation system, such as examinations, peer review, fixed term appointments and quality appraisal to ensure that the quality mark remains justified.[59]

The Office of Fair Trading concluded thus:

[55] Association of Women Barristers, Response to the Consultation paper on Constitutional reform: the future of Queen's Counsel' *UK Government Archive* <https://webarchive.nationalarchives.gov.uk/20070521230000/http://www.dca.gov.uk/cons ult/qcfuture/responses/qc018.pdf> (Accessed on 17 May 2020).

[56] L. Peach, 'Independent Scrutiny of the Appointment Processes of Judges and Queen's Counsel' (Lord Chancellor's Department, 1999) p 39 in Michael Blackwell *supra n* 48 p 8

[57] Lord Chancellor's Department, *Judicial Appointments: Annual Report 2000-2001* Cm 5248 (2001) para. 4.13

[58] Commission for Judicial Appointments, *Annual Report 2003* (2003) para 4.1.

[59] Director General of Fair Trading *supra n* 53.

…the existing QC system does not operate as a genuine quality accreditation scheme. It thus distorts competition among junior and senior barristers. Our evidence indicates that clients do not generally need the assistance of a quality mark, but if there is to be such a scheme, it should be administered by the profession itself on transparent and objective grounds.[60]

As a way to instigate reforms, the Department for Constitutional Affairs published a consultation paper and an analysis of the responses to the paper. A year later, it published a further consultation paper titled Constitutional reform: the future of Queen's Counsel. Appointment of Queen's Counsel was suspended during this time. Appointments resumed in 2004, with the Lord Chancellor announcing the dissociation of his office with the appointment process.[61] The Queen's Counsel Selection Panel, an independent and self-funded body, now makes recommendation for appointment of Queen's Counsel. The Panel comprises an independent lay as its chair, two solicitors, two barristers, a senior member of the judiciary, and four other lay members.[62] It operates a competency based selection process where recommendations for appointments are based on evidence of:

a) Understanding and using the law;

b) Written and oral advocacy;

c) Working with others;

d) Diversity; and

e) Integrity.[63]

[60] *ibid* para 278.
[61] Lord Falconer of Thoroton's written statement dated 26 May 2004 announcing the decision to retain the rank of Queen's Counsel.
[62] Michael Blackwell *supra n* 48 p 9.
[63] QC Selection Panel, 'Queen's Counsel Competition for England and Wales 2019: Competency Framework' <http://www.qcappointments.org/wp-content/uploads/2017/02/The-Competency-Framework-2017.pdf> (Accessed on 17 May 2020).

A clear demonstration of what the competencies are and how they are assessed is intricately set out in the Competency Framework,[64] thus making the outcome valid and more reliable.[65]

Upon conferment, the Queen's Counsel are still represented by the Bar Council (if they are barristers) or by the Law Society (if they are Solicitors). This means that the award of silk does not exempt them from fulfilling their obligations under their respective regulatory bodies and as such are still regulated by the regulatory arms of those bodies, that is, the Bar Standards Board and the Solicitors Regulatory Authority respectively.

5.2 Eligibility Criteria for Conferment of the Rank of Senior Advocate of Nigeria

Just like any other jurisdiction, the conferment of the award of Senior Advocate of Nigeria (SAN) is not as of right. Certain requirements have to be met and an application has to be made to the Legal Practitioners' Privileges Committee.66 [66]The Guidelines for the Conferment of the Rank of SAN provide inter alia for the guiding principles and requirements for the conferment. Fulfilment of the stipulated criteria for eligibility as defined and published from time to time by the Legal Practitioners' Privileges Committee is the primary basis for appointment.[67] Under eligibility, a candidate eyeing the award of SAN must be a legal practitioner called to the Nigerian Bar and practising in Nigeria as an advocate and must have been in active current legal practice for at least 10 years immediately preceding the date of application.[68]

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[64]ibid.

[65] Reliability refers to the stability of the assessment, for example, whether on different occasions or using different markers the same outcomes are rated in the same way. However, for QC appointments, extremely high levels of reliability are not expected since professional judgement is largely subjective. Nonetheless, the aim should still be to achieve the highest attainable level of consistency and predictability compatible with the style of assessment. *See* Cambridge Approach to Assessment '*Principles for designing, administering and evaluating assessment'* (2009) <www.cambridgeassessment.org.uk/Imagescambridge-approach-to-assessment.pdf > (Accessed on 17 May 2020).

[66] Guidelines for the Conferment of the Rank of Senior Advocate of Nigeria and All Matters Pertaining to the Rank, 2018, para 9.

[67] *ibid* para 2(f).

[68]*ibid* para 22(1).

Meaning that the minimum post-call qualification is 10 years and the legal practitioner must have been in active legal practice as an advocate and must have achieved distinction in the legal profession.[69]

As proof of competence, the focal points include full time legal practice, having distinguished themselves as an advocate by demonstrating excellence in advocacy skill, having made significant contribution to the development of the legal profession in Nigeria, possessing sound knowledge of the law and using such knowledge for the advancement of the administration of justice, having appeared in contested cases of significance coupled with demonstrating a high professional and personal integrity while complying with the etiquette at the Bar.[70] Other considered factors include professional and personal integrity, good character and reputation, relation with clients, colleagues, court as well as contribution to the profession, community, enhancement of law office and development of human capital. In addition, a candidate for the award of SAN should demonstrate clear qualities of leadership and loyalty to the legal profession by inter alia providing at least three (3) pro bono legal services to indigent persons.[71]

For clarity purposes, the Guidelines provide a specific number of cases that a candidate must have contested in the different court hierarchies to be eligible for conferment. An Applicant shall provide particulars of cases as follows:-

a) 20 final judgments of the High Court or Superior Court of Records provided that in respect of such cases conducted at the High Court or Superior Court of Records, an Applicant shall provide certified true copies of complete record of trial proceedings and processes signed and filed by the Applicant… and a soft copy in at least twelve contested cases from trial stage to judgment, showing that the Applicant as counsel substantially conducted the trial. In addition, an Applicant shall provide letters of instruction from the client(s) as well

[69] Legal Practitioners Act (Cap. L 11) Laws of the Federation of Nigeria 2004 section 5(2).
[70] Guidelines for the Conferment of the Rank of Senior Advocate of Nigeria and All Matters Pertaining to the Rank, 2018, para 1, 14, and 23.
[71] *ibid* para 23(7)(a) & (c).

as a letter from the Head of Court or Judge that delivered the judgment, confirming/verifying the Applicant as counsel that conducted the case from trial stage to judgment;

b) 5 final judgments of the Court of Appeal supported by briefs along with valid notices of appeal duly settled and argued by the Applicant; and

c) 4 final judgments of the Supreme Court supported by briefs along with valid notices of appeal duly settled and argued by the Applicant; however, where it is manifest that the Applicant himself has conducted the case from the High Court up to the Supreme Court, he will be required to submit 3 final judgments of the Supreme Court supported by Appellant/Respondent briefs along with valid notices of appeal duly settled at appellate courts and argued at the three tiers of courts.[72]

Thus, a candidate who is applying for the award of SAN (that is, non-academic SAN) is expected to have conducted to full conclusion 20 cases at the High Court or Superior Court of Record, 5 cases at the Court of Appeal, and 4 cases at the Supreme Court or 3 Supreme Court cases if the candidate (applicant) conducted the cases from the High Court to the Supreme Court. All these cases must have been conducted to full conclusion within a period of 10 years immediately preceding the date of application. Thus, substantial participation as counsel in the conduct of the cases is vital in order to qualify for the rank of SAN. More so, such cases must be considered ground breaking, or landmark decisions were made in respect of them. The cases should involve issues of significant legal or public interest, decide novel points of law and are frequently cited in the Law Courts.[73]

As regards the leadership and structure of the Legal Practitioners' Privileges Committee, Nigeria offers very important lessons that Kenya can learn from. The Legal Practitioners Act[74] comprises the following:

1) Chief Justice who is the chairperson of the Committee;

[72] *ibid* para 14(1) and (5).
[73] *ibid* para 23(5).
[74] Legal Practitioners Act, Cap 207, section 5(1).

2) Attorney-General;
3) One Justice of the Supreme Court chosen by the Chief Justice and the Attorney General for a period of two years renewable once;
4) President of the Court of Appeal
5) Five of the Chief judges of the states chosen by the Chief Justice and the Attorney-General for a term of two years renewable once;
6) Chief Judge of the Federal High Court; and
7) Five legal practitioners who are Senior Advocates of Nigeria. They are chosen by the Chief Justice and the Attorney General for a term of two years renewable once only.[75]

As established, unlike the situation in Kenya, membership to the Legal Practitioners' Privileges Committee is not a lifetime opportunity. Those chosen by the Chief Justice and the Attorney General have a term limit of two years, which is renewable only once. In addition, the members to this Committee are chosen by the Chief Justice and the Attorney-General, save for the Chief Justice, the Attorney-General, President of the Court of Appeal and the Chief Judge of the Federal High Court.

Quite commendably, the Senior Advocates of Nigeria together form the Body of Senior Advocates of Nigeria (BOSAN), a body that is chaired by a Secretary who is a SAN and is elected by the other SANs. BOSAN has a fully functional secretariat.

Based on the above analysis, the following section suggests recommendations that should be (re)considered to ensure the rank of Senior Counsel in Kenya is devoid of politics and retains its validity and consequently its reliability.

6 Recommendations

This paper makes the following recommendations to offer more insight on how a better structure and leadership of the Senior Bar in Kenya can be achieved.

[75] *ibid* section 5.

6.1 Democratization of the Senior Bar

Unlike the situation in Kenya, membership to Nigeria's Legal Practitioners' Privileges Committee is not a lifetime opportunity. Those chosen to the Committee have a term limit of two years, which is renewable only once. In addition, the members to this Committee are chosen by the Chief Justice and the Attorney-General, save for the Chief Justice, the Attorney-General, President of the Court of Appeal and the Chief Judge of the Federal High Court. Meaning Nigeria has a clear outline on how its Legal Practitioners' Privileges Committee is structured and led. Besides, all the Senior Advocates of Nigeria have a Body of Senior Advocates of Nigeria (BOSAN), a body that is chaired by a Secretary who is a SAN and is elected by the other SANs. BOSAN also has a fully functional secretariat.

However, the same cannot be said of Kenya's Senior Bar. The de facto leader, Fred Ojiambo, SC has served the Senior Bar for the past seventeen years. Going forward, the first task of Senior Counsel should be to elect the leader of the Senior Bar to serve for a term of two years renewable once. The second task should be to reconstitute the Committee of Senior Counsel and elect three Senior Counsel. Therefore, it is imperative that membership to the Committee on Senior Counsel is restricted to a definite period of time, preferably two years. This applies to all members of the Committee except the Attorney-General, who will be a member of the Committee for as long as he or she holds the office.

This will, therefore, call for an amendment of the Advocates (Senior Counsel Conferment and Privileges) Rules, 2011 to redefine the Committee's composition to have the two advocates, not being Senior Counsel, under Rule 3(1)(g) replaced with two other Senior Counsel so the Committee can be comprised of five Senior Counsel. Besides, the amendment should incorporate the election of the Chairperson of the Committee by all Senior Counsel on the Roll of Senior Counsel. Moreover, the term of the Chairperson and the other members, save for the Attorney-General, should be limited to two years, renewable only once.

6.2 Anchor the Committee on Senior Counsel in the Law Society of Kenya Act

The LSK Act makes no mention of Senior Counsel. This paper proposes that the Committee on Senior Counsel should be institutionalised and anchored in the LSK Act. This will synergise the functions of the LSK Council and the Committee on Senior Counsel on matters touching on public interest. This will also create a legitimate public interest function of the Committee on Senior Council and define its mandate.

In addition, on the issue of whether Senior Counsel can be summoned by the LSK Council, it is important to note that despite the privileges flowing from being a member of the Senior Bar, Senior Counsel are not independent of the Council. Just like the Queen's Counsel who are subject to the Bar Standards Board and the Solicitors Regulatory Authority for barristers and solicitors respectively, it is important for the Senior Counsel to still fulfil their obligations under the LSK Act. Consequently, the meeting convened by the President of the Law Society is done in accordance with section 4(i), 5, and 7(1) of the LSK Act. Indeed Dr. Kamau Kuria in his letter confirming his attendance to the meeting, has set out various issues that should be of concern to the Senior Bar, including but not limited to finding a working formula with the Chief Justice and the Courts.

6.3 Mandatory Distinct Dress Code

In England, there is a distinct dress code that is an identification unit for a Queen's Counsel. Barristers who have been appointed as Queen's Counsel wear a silk gown with a flap collar and long closed sleeves (the arm opening being half-way up the sleeve). They also wear a court coat, similar to a black morning coat, instead of an ordinary suit jacket. On ceremonial occasions, and when appearing before the bar of the House of Lords, Queen's Counsel wear ceremonial dress.

Likewise, members of the Senior Bar need to be distinct in their dress code. They should have a unique gown (of an acceptable colour) and wig made of prestigious fabric. This will distinguish members of the Senior Bar from the other members of the Bar.

6.4 Distinct Senior Counsel Remuneration Order

The honorary accolade attracts general public importance because it is rationalized as a trademark of quality for the consumers of legal services. Besides, the highly sought after pre-eminent award attracts individual gravity since it offers a quantum leap in the amount of legal fees charged by the bearer, as already indicated above. This means that members of the Senior Bar can charge fees higher than what is stipulated in the Advocates Remuneration Order. For consistency purposes, it is imperative that the Advocates Remuneration Order be amended to include minimum amounts of what a Senior Counsel can charge, which ordinarily should be at least twice the minimum amount stipulated in the Advocates Remuneration Order as it currently is.

In the alternative, an amendment of the Advocates (Senior Counsel Conferment and Privileges) Rules, 2011 should be effected to provide for minimum amounts a Senior Counsel can charge.

6.5 Rigorous Nomination Process to the Senior Bar

The UK has a fairly predictable and reliable Queen's Counsel appointment process. Its Competency Framework lays down in good detail the standards of excellence in each eligibility criterion. For example, the 2019 Competency Framework (Guidance for Applicants) explains further what 'understanding of the law', 'written and oral advocacy', 'working with others', 'diversity', and 'integrity' mean. These can be pointers for the current Committee on Senior Counsel to come up with better details on what they mean by 'active legal practitioner', 'sound knowledge of the law', 'irreproachable professional conduct', 'active service to the Society', and 'contribution to the development of the legal profession'.

Moreover, the appointments should not be seen as automatic trophies awarded to undeserving candidates. Factors, like political affiliation, that do not necessarily relate to the applicant's capacity to perform the roles associated with the Rank of Senior Counsel should not be reasons for conferment since in so doing the legal profession risks having people who are incompetent and with questionable and doubtful credentials as Senior Counsel. Such people do

not inspire confidence to the members of the Law Society and the legal services' consumers.

Therefore, the appointment process to the Rank of Senior Counsel should be extremely rigorous in order to award only the most deserving candidates. The focal points for conferment should include full time and active legal practice, the candidates having distinguished themselves as advocates by demonstrating excellence in advocacy skills, having made significant contribution to the development of the legal profession, possessing sound knowledge of the law and using such knowledge for the advancement of the administration of justice, having appeared in contested cases of significance coupled with demonstrating a high professional and personal integrity while complying with the etiquette at the Bar.[76] The candidates should preferably appear before the Committee and make a presentation before appointment. It is imperative that the Committee on Senior Counsel considers these criteria in a mutually inclusive manner.

7 Conclusion

Several reasons have been established as to why the advocate who holds the rank of Senior Counsel is a matter of general public importance. These reasons were that the rank is justified as a trademark of quality thus inspiring confidence to the consumers of legal services; it is a quantum leap for the Senior Counsel to charge higher fees; the Senior Counsel dresses in a special robe comprising a sleeved waistcoat like those worn by Court of Appeal judges; the Senior Counsel sits in front of the judges and magistrates in courts; and takes precedence of the other advocates who are not Senior Counsel. Be that as it may, the Senior Bar in Kenya has for far too long lacked a clear structure and leadership outline of its Committee. As such, to ensure that the rank of Senior Counsel retains its worth, as previously suggested, the following measures, inter alia, should be taken: a) democratize the Senior Bar; b) anchor the Committee on Senior Counsel in the LSK Act; c) a mandatory distinct dress code in Court for Senior Counsel;

[76] 2018 Guidelines for the Conferment of the Rank of Senior Advocate of Nigeria and All Matters Pertaining to the Rank para 1, 14, 23.

a distinct Senior Counsel Remuneration Order; and e) a rigorous nomination process to the Senior Bar.

Kenya's Sand Harvesting laws and the Sustainable Development Licence to Operate: In Quicksand?

By: ***Caroline Katisya-Njoroge***[1]

Abstract

The Sustainable Development Licence to Operate is the new framework for governing mineral resources. The International Resource Panel has developed a Report that declares that the environmental and social impacts of sand extraction are an issue of global significance. Sand mining is prevalent and creates acute environmental degradation and conflicts. This article juxtaposes Kenya's sand harvesting laws against evolving global mining norms and assesses whether the country is in quicksand with regard to the governance of the sector and reviews available solutions.

1. Introduction

Sand is ubiquitous. Sand, crushed rocks, gravel and pebbles are referred to as aggregates which are important construction materials.[2] Apart from concrete in the construction industry, sand is used in land reclamation, as asphalt in infrastructure construction, water filtration, glass production, hydraulic fracking, building materials, the manufacture of electronic equipment amongst other uses. Sand is not homogenous and is characterized according to its size, density and composition. The best sand for construction is found on river beds and river banks. Ranking a close second is sand from coastal and marine areas although due to its saline nature it requires to be washed before utilization. The final source of sand is terrestrial from pits and quarries, but surprisingly desert sand which is plentiful is not good for construction as it is it too smooth to be a good adherent.[3]

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[2] Sand for purposes of this article refers to aggregates. It does not include mineral sands which may have rutile, ilmenite, zircon and other minerals.

[3] Infra, n.7, p. 29

In spite of the Covid-19 pandemic in 2020, Kenya experienced a construction boom due to housing and infrastructure development. The statistics from the cement industry, which are a strong indicator of the consumption of aggregates, showed an increase in consumption by 20% to 6.5 million tonnes[4]. This is driven in large part by the government's Vision 2030 third mid-term plan 2018-2022 which emphasizes the importance of the construction sector to its Big Four Agenda and in particular housing. Sand harvesting plays a critical role in the economic development of the country including creating jobs, multiplier effects to the economy and growth of government revenues. Globally it is estimated that the equivalent of 50 billion tonnes per year or 18 kg of sand per person per day[5] is extracted. The sand industry is experiencing growing demand. International trade in sand is a growing trend indicating its ever expanding demand globally.

In 2019, the International Resource Panel[6] developed the *Sand and Sustainability Report*[7] which highlights some key facts:

- Sand is the largest extracted and traded solid resource by volume globally.
- It is the least regulated resource in many jurisdictions.
- The extraction rate is exceeding the replenishment rate and therefore it is no longer viewed as a renewable resource.
- Sand harvesting causes major impacts to riverine, marine and terrestrial areas through biodiversity and environmental degradation, sedimentation of coral reefs, lowering the water table, pollution, drying up of tributaries, turbidity of water, erosion of river banks and shorelines leading to flooding, and diverting waterways. It also leads to injuries and death for the

[4] '*Cement Consumption rises 20%*', Business Daily, 19th February, 2021
[5] Infra, n.7, p. xi
[6] This is a panel of scientists and experts established in 2007 to address under the auspices of United Nations Environment Programme.
[7] *Sand and Sustainability: Finding New Solutions for Environmental Governance of Global Sand Resources*, United Nations Environment Programme/GRID-Geneva (2019).

sand harvesters and results in negative impacts on tourism, fisheries and agriculture.

- The local and international media often refer to 'sand wars'[8] when reporting on the sector in order to highlight the prevalent conflicts between sand harvesters with local communities, violence and cartel (sand mafia) networks that are associated with the sand industry.
- The environmental and social impacts of sand extraction is an issue of global significance.

The Report identifies Kenya as one of the critical hotspot countries globally. [9] The proposition of this article is that the 'sand wars' are a manifestation of a weak governance structure for sand[10] in Kenya. We introduce the concept of Sustainable Development Licence to Operate, examine Kenya's governance structure and make a preliminary assessment on whether the sand sector is eligible for a Sustainable Development Licence to Operate and propose a way forward.

8

'*Kenya's illegal sand miners destroy farms to plunder scarce resource*', Thomson Reuters Foundation, Shadrack Kavilu, 6 October 2016, accessed at https://www.reuters.com/article/us-kenya-landrights-sand-mining/kenyas-illegal-sand-miners-destroy-farms-to-plunder-scarce-resource-idUSKCN126116, on 26th April, 2021.

'*Kenya's Sand Wars. Communities are pitted against sand harvesters, powerful cartels and one another as demand for sand in Kenya grows*', Aljazeera, Harriet Constable, 2017, accessed at https://interactive.aljazeera.com/aje/2017/kenya-sand-wars/index.html, on 26th April, 2021.

'*He who controls the sand: the mining 'mafias' killing each other to build cities*', The Guardian, Vince Beiser, 28th February, 2017, accessed at https://www.theguardian.com/cities/2017/feb/28/sand-mafias-killing-each-other-build-cities, on 26th April, 2021.

'*Three killed after sand mine collapses in Makueni*', The Star, Dec. 19, 2017, By Mutua Kameti, accessed at https://www.the-star.co.ke/news/2017-12-19-three-killed-after-sand-mine-collapses-in-makueni/, on 26th April, 2021.

[9] Supra n.7, p. 5
[10] Ibid, p. 29

2. Sustainable Development Licence to Operate

One of the significant events in the mining sector in 2019 was the passage of the Mineral Resource Governance UNEP Assembly Resolution[11]. The Resolution recognized various expert reports including the *Sand and Sustainability Report* and the *Mineral Resource Governance in the 21st Century: Gearing extractive industries towards sustainable development*[12]. The Resolution recognizes the importance of minerals in the fight for climate change and in achieving the Sustainable Development Goals. The Resolution by the premier United Nations environmental agency embraces the mining sector as an important partner in combating environmental challenges. It moves from the past perception of the mining sector as being the cause of the problem of environmental degradation to the sector being part of the solution. The Resolution emphasizes the concept of decoupling economic growth from resource use and environmental degradation and well-being.

The *Mineral Resource Governance in the 21st Century* establishes the concept of Sustainable Development Licence to Operate[13](SDLO). The SDLO ties the mining sector to the achievement of the SDGs. It replaces the Social Licence to Operate which narrowly focused on community engagement, consultation and buy in through a non- binding private sector led process, with SDLO, under which polycentric interests, actors and networks at global, national and local level, home and host countries, private sector, local communities and artisanal miners are merged. The SDLO framework calls for the integration of all stakeholders involved in the entire global mineral supply chain to develop a holistic integrated

[11] United Nations Environment Assembly of the United Nations Environment Programme, Fourth session Nairobi, 11–15 March 2019, Resolution 4/19

[12] IRP (2020). Mineral Resource Governance in the 21st Century: Gearing extractive industries towards sustainable development. Ayuk, E. T., Pedro, A. M., Ekins, P., Gatune, J., Milligan, B., Oberle B., Christmann, P., Ali, S., Kumar, S. V, Bringezu, S., Acquatella, J., Bernaudat, L., Bodouroglou, C., Brooks, S., Buergi Bonanomi, E., Clement, J., Collins, N., Davis, K., Davy, A., Dawkins, K., Dom, A., Eslamishoar, F., Franks, D., Hamor, T., Jensen, D., Lahiri-Dutt, K., Mancini, L., Nuss, P., Petersen, I., Sanders, A. R. D. A Report by the International Resource Panel. United Nations Environment Programme, Nairobi, Kenya

[13]ibid. p. 11

governance framework. It establishes a framework of joint responsibility and mutual accountability.

The SDLO is anchored on principles of coherent and standardized laws instead of opaque contracts, systems thinking approach throughout the supply chain and inclusive decision making to achieve fairer deals and equitable sharing of benefits. The pillars of the SDLO are planetary boundaries, stakeholders, resource efficiency, circular economy and life cycle analysis. The SDLO redefines the scope of sustainable development from the triple bottom line to the quadruple bottom line of economic, social, environmental; and governance and transparency goals.

The pathways to operationalize the SDLO include building on existing initiatives, organic growth with decisive action where required, a global agenda platform, collective investments and the establishment of an International Mineral Agency which will be the first international body overseeing the mining sector globally.

The SDLO concept fits into the new environmental governance (NEG) approach trend. This adopts a collective, integrated, participative, adaptive, transparent and knowledge based form of governance.[14] This approach does not discard prescriptive and market based incentives, but integrates them to NEG. One of the benefits of NEG is that it is based on knowledge, learning from failures and incorporating diverse views through discourse.

3. The Governance of Sand in Kenya

3.1. What is Sand?

Article 260 of the Constitution defines 'natural resources' as including the physical non- human factors and components whether renewable or non-renewable, including minerals and rocks. Although sand is not expressly mentioned in the non- exhaustive list, it is by definition a natural resource. Sand is not only an economic commodity but it is also an important natural

[14] Cameron Holley, Environmental regulation and governance, Regulatory theory: foundations and applications / Peter Drahos (editor), ANU Press, 2017

resource. It is the base resource that supports all life. In the marine and coastal environment[15] for example sand supplies critical ecosystem goods and services. Sand dunes and beaches are an important habitat for marine biodiversity, sand dunes filter freshwater in coastal areas, it supports sea grasses which are important feeding grounds for marine life and provides protection against the impact of cyclones, tsunamis, waves and sea level rising. In equal measure sand plays an important role in terrestrial and riverine ecosystems.

Under the *Environmental Management and Coordination Act No. 8 of 1999*[16], (EMCA) sand falls in the rubric of 'soil' which also includes rock, dust, earth and shale. The *Kwale Quarrying Act No. 11 of 2016*[17] uses the term 'common minerals' which are defined to include: clay, sand, rock, gravel, lime, slate, ornamental stone. The terminology of common mineral is borrowed from the repealed Mining Act of 1940. *The Machakos County Management of Quarrying Activities Act No. 4 of 2016*[18] defines 'quarrying materials' to mean a substance used in its natural state in civil construction or agricultural purposes and includes sand, marble, brine, dimension stone, gravel, rock, granite, aggregate, peat, murram, surface stones, soil, clay and others. *The Makueni County Sand Conservation and Utilization Act 2015*[19] defines sand in terms of its properties.

There is lack of clarity on whether sand is a mineral under the *Mining Act No. 12 of 2016.* This was the subject of the case of *Bustra Saving and Credit Co-operative Society Limited & another v County Government of*

[15] Integrated Coastal Zone Management (ICZM) Policy, Republic of Kenya, Ministry of Environment, Water and Natural Resources, December 2013
[16] S. 2
[17] S. 2
[18] S. 2
[19] S.2 *"Sand" means sedimentary material finer than gravel and coarser than silt with grains between 0.06mm and2mm in diameter and includes stones, coral, earth and turf but does not include silica sand, this does not include sand that has been made through the crushing of rocks;'*

Tharaka Nithi County [2019] eKLR[20]**,** where the Court stated that the quarry raw materials are not minerals as per the said statute. The Court based its decision on the First Schedule[21] of the said Act which did not include sand *per se* at the time of enactment. However the said Act[22] defines 'construction minerals' which includes sand and other aggregates. In Legal Notice 67 of 2017, the Cabinet Secretary in accordance with powers conferred by section 2 (2) of the said Act, to amend the First schedule[23], gazetted the Declaration of Construction Minerals which includes sand, granite, gravel, sandstone, slate, gneisses, amongst other aggregates. Further Legal Notice No. 187 of 2013 imposes a 2% royalty on gross values of construction minerals. The definition of a mine[24] includes a quarry. The quandary on whether sand is a mineral may be attributed to society's misconceptions and disregard for sand due to its low price, abundance and widespread availability which makes it incomparable to rare or highly valued minerals.

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[20] '*Quarry stones, murram, quarry chips and other quarry products are not in my view minerals governed under the Mining Act No.12 of 2016. … It would be extrapolating the objects and purpose of the Mining Act too far in my view, if one was to conclude that quarry stones, hardcore and other quarry products like quarry chips fall within the meaning of "**minerals**" in the Mining Act 2016. It is clear that under the Mineral Act, one has to acquire prospectors license, mining, permit among other requirements under the Mining Act to prospect or mine minerals in Kenya. Those requirements do not apply to mining or production of quarry stones, murram or quarry chips. Parliament when enacting the Mining Act certainly never intended to include quarry stones, murram or quarry chips as part of "**minerals**" within the meaning of that Act and more so as can be seen in the First Schedule of the Act the same are missing in the list provided.'*

[21] S. 2 Mining Act No. 12 of 2016 The scope of application of the Act is limited only to minerals in the First Schedule

[22] Ibid, S.4'*stones, gravel, sands, soils, clay, volcanic ash, volcanic cinder and any other minerals used for the construction of buildings, roads, dams, aerodromes and landscaping or similar works, and such other minerals as the Cabinet Secretary may from time to time declare to be construction minerals, by notice published in the Gazette*.'

[23] It is arguable whether a Cabinet Secretary can amend a legislation passed by Parliament under the tenet of *delegatus non potest delegare*.

[24] Supra n. 21, S. 2

3.2. Who Owns Sand?

By virtue of Legal Notice No. 67 of 2017 and s. 6 (1) of the Mining Act, sand is vested in the government like other natural resources such as fisheries[25], minerals[26], geothermal resources[27], renewable energy sources[28], water[29]and public forests[30]. Under the Mining Act sand is vested in the government despite the ownership of the land where it is found[31]. This is consistent with the Constitution and particularly Article 62(3) which vests minerals in the national government.[32]

Despite the state ownership of sand under the Mining Act, the exploitation of sand in Kenya has adopted an open access approach. This has led to the 'tragedy of the commons' in many areas as predicted by Hardin[33]. The free access especially to public lands (rivers and coastal shores) creates a situation of low risk and low cost for a product that is in high demand, thereby creating a competitive race to the bottom scenario. There is no incentive for sand harvesters or dealers to manage or conserve the resource. Any conservatory measures equally suffers from the free rider[34] phenomenon. There is currently no way of accurately tracing the provenance of sand resources, hence creating a loophole for illegal sand mining.

[25] S. 29 Fisheries Management and Development Act No. 35 of 2016
[26] S. 6 Mining Act No. 12 of 2016
[27] S. 77 Energy Act No. 1 of 2019
[28] Ibid, s. 73
[29] S.5 Water Act No. 43 of 2016
[30] S. 31 Forests Conservation and Management Act No. 34 of 2016 (public forests are vested in the Kenya Forests Service)
[31] S. 6 (3) Mining Act
[32] S. 7 Mining Act reserves the rights of communities to take soil, clay, salt, iron and soda ash from any land from the application of the Act. Customary usage rights do not apply to areas where a mineral right has been formally granted.
[33] Hardin, G 1968. 'The tragedy of the commons', Science 162: 1243–8. doi.org/10.1126/science.162.3859.1243 .
[34] Emily Tastet, Stealing Beaches: A Law and Economics Policy Analysis of Sand Mining , 7 LSU J. of Energy L. & Resources (2019), p.38 Available at: https://digitalcommons.law.lsu.edu/jelr/vol7/iss2/11

3.3. Who Regulates Sand?

The starting point is Article 69 of the Constitution which requires the state to sustainably utilize, exploit, manage and conserve the environment and natural resources and share the accruing benefits in an equitable manner. There are three main governance structures for regulating sand at the national level i.e. mining, environmental and planning laws.

3.3.1.1. National Government

3.3.1.2. Mining

The Mining Act establishes a licensing regime which confers mineral rights to large scale, small scale and artisanal miners. The first two have different licences for different phases of mining operations[35] which are issued by the Cabinet Secretary[36] on the advise of the Mineral Rights Board[37]. The licences have conditions that incorporate technical, reporting, local content, safety, environmental and other terms that must be complied with. Artisanal mining is authorized by the County Director of Mines[38] on the recommendation of the Artisanal Mining Committee[39]. The difference between artisanal and small scale miners is that the former employs rudimentary tools and techniques and is reserved for Kenyans. The Mining Policy[40] envisages sand quarrying as being undertaken by artisanal miners. Prior to 2016, artisanal mining was illegal. The Mining Act has established a process of organizing and licensing artisanal mining which is in the nascent stages of implementation.

3.3.1.3. Environment

In the case of *Celestine John Aoko & others v Shem Owino Muga & 7 others; Amicus Curiae Kenya National Commission on Human Rights [2019] eKLR*, the Applicants claimed that sand harvesting had caused flooding in their farms, broken dykes and created pits which posed a safety risk amongst other hazards. The Court held that the National Environment

[35] reconnaissance (survey), prospecting and exploration
[36] S. 32
[37] S. 31
[38] S. 95
[39] S. 94
[40] Mining and Minerals Policy Sessional Paper no. 7 of 2016

Management Authority (NEMA) retains regulatory powers over sand harvesting activities through the *National Sand Harvesting Guidelines, 2007*, issued pursuant to Section 42 (4) of EMCA.

The *National Sand Harvesting Guidelines, 2007* are secondary legislation that apply to all sand harvesting activities in Kenya and is aimed at ensuring sustainable utilization of sand resources and proper management of the environment. The key provisions are:

a) The Guidelines establish the Technical Sand Harvesting Committee (TSHC) whose main mandate is to be responsible for the proper and sustainable management of sand harvesting within the County, designate sand harvesting sites, ensure that sand dams and gabions are constructed in designated areas, designate sand transportation roads, ensure EIA/EA are undertaken, undertake dispute resolution, fix minimum sand prices, monitor restoration of sites and allocate areas to the Riparian Resource Management Association (RRMA).

b) The Guidelines further establish a Riparian Resource Management Association (RRMA) which comprises community leaders with the mandate to require EIA before sand harvesting operations start, annual environmental audits, sustainable management, provide access to sites, collection of revenues to be employed in rehabilitation of sites and revenue sharing with the community.

c) It[41] places responsibilities on sand dealers and transporters to comply with the Guidelines and the law.

d) It identifies the social impacts of sand harvesting and bans child labour, requires fair wages, the organization of loaders for self-regulation and establishes a revenue sharing mechanism[42].

e) It requires sand harvesting to occur in designated areas only and under an environmental management plan[43].

[41] Clause 10
[42] Clause 4
[43] Clause 6

f) The said guidelines[44] provide for Farm, Lakeshore/Seashore and Riverbed sand harvesting as follows: it shall not exceed six (6) feet in depth, on-farm sand harvesting must be carried out at designates sites with a buffer zone of at least 50 metres from the riverbanks or dykes for, restoration will be undertaken concurrently with harvesting and under guidance from the Technical Sand Harvesting Committee, open-cast harvesting is recommended and underground tunneling must employ appropriate extraction technology to safeguard human safety.
g) Riverbed sand harvesting is banned on riverbanks, must be carried out in designated sites, must retain adequate reserves of sand to ensure water retention and maintain a buffer zone of 100 metres from any infrastructure.
h) The Guidelines[45] require any person who wishes to remove and/or transport sand to obtain a written approval from the District Environment Officer, NEMA.
i) The Guidelines[46] bar harvesting or transporting sand during the night.

In the case of *John Muthui & 19 others v County Government of Kitui & 7 others [2020] eKLR,* the petitioners claimed that River Tiva in Kitui had dried up because of sand harvesting. The Court recognized that sand harvesting is necessary for economic development but upheld the principle of sustainable development and its ancillary principles of inter-generational equity, precautionary principle, sustainable, prudent, equitable and wise use. It granted conservatory orders against permitting sand harvesting as the activity constituted a threat to the Petitioner's right to a clean and healthy environment. The Court held:

> '112. *Rivers all over the world are under immense pressure due to various kinds of anthropogenic activities, among them indiscriminate extraction of sand and gravel which is disastrous as the activity threatens the river ecosystem.*

[44] Clause 7 and 8
[45] Clause 9
[46] Clause 10

> *'113. Sand harvesting activities affects the environment by causing land degradation, loss of agricultural lands, low availability of water and poor quality of water in the affected rivers. Bed degradation of rivers due to sand harvesting undermines bridge support, and may change the morphology of a river, which constitutes aquatic habitat. The loss of this ecosystem affects the environment in many and far reaching ways. To address the issue of sustainable harvesting of sand, NEMA has come up with sand harvesting guidelines (National Sand Harvesting Guidelines, 2007).'*

There is no doubt that sand as a natural resource is subject to the environmental governance structure. NEMA has the legal responsibility[47] to take an inventory and valuation of natural resources and examine the impact of land use patterns. By virtue of the powers[48] to protect rivers, lakeshores, seashores and wetlands the Cabinet Secretary for the Environment may enact regulations, orders and guidelines in respect of these areas[49]. Further artisanal quarrying and mining of sand are categorized as medium and high risk projects respectively, which require a full EIA study and process to be undertaken.

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[47] S. 9 EMCA *(b) take stock of the natural resources in Kenya and their utilisation and conservation; (bb) audit and determine the net worth or value of the natural resources in Kenya and their utilization and conservation; (c) make recommendations to the relevant authorities with respect to land use planning; (d) examine land use patterns to determine their impact on the quality and quantity of natural resources;*

[48] S. 42 EMCA

[49] The Integrated National Land Use Guidelines, 2011 prepared by NEMA places on the District Environment Committee the power to control all activities in wetlands (e.g. regulating brick making, sand and clay harvesting) requiring that the users form voluntary societies and where necessary be licensed in accordance with the EMCA (Wetland Regulations) of 2009.[49] The Guidelines propose several interventions with regard to protection of the coastal zone including[49]:

a) *''Regulate and gazette as conservation areas sand dunes known to be water catchment areas and prohibit any form of development and mining of sand;*
b) *Protect near shore coral reef from damaging activities such as soil erosion, non-point source pollution, dredging and alterations to near shore water circulation.''*

The Water Act has extensive provisions on conservation and management of water on watercourses, basin areas, water catchment areas, sea water and ground water. The Water Act[50] makes it an offence to pollute or divert or interfere with water from a water course or water resource. Although most sand mining in Kenya occurs in or next to rivers and seasonal streams and especially in arid and semi-arid areas, the institutions established under the Water Act play a limited role at regulating sand mining despite the clear threat to water resources. The *Wildlife Conservation and Management Act No. 47 of 2013*[51] permits quarrying in national parks, nature reserves, wildlife conservancies and sanctuaries provided that the approval of the Kenya Wildlife Service is obtained and the activities comply with EMCA and are not undertaken in protected or critical habitats or impact catchment areas, endangered or threatened species.

In addition there is a plethora of multilateral environmental agreements that Kenya has ratified at the global and regional levels. For example, the *Convention on Biological Diversity* has established SEA and EIA guidelines for marine areas which are oriented towards biodiversity and guide marine dredging activities[52].

3.3.1.4. Planning Laws

Other than environmental laws, planning laws also govern sand extraction. Planning laws are the main regulatory instrument for the management of aggregates sourced from land in the UK. The *Physical and Land Use Planning Act No. 13 of 2019* places environmental concerns and sustainable use of natural resources as necessary considerations in spatial planning, development control and permission, zoning and land use planning at the national, county and sub-county levels. The Act provides several policy instruments to guide the regulation of the sector as an important land use.

[50] S. 143
[51] S. 45
[52] CBD Voluntary Guidelines for the consideration of Biodiversity in Environmental Impact Assessments (EIAs) and Strategic Environmental Assessments (SEAs) in Marine Areas, UNEP/CBD/COP/Decision VIII/28, 15 June 2006, accessed at https://www.cbd.int/decision/cop/?id=11042 on 29th April, 2021.

3.3.1.5. County Government

The Constitution[53] has conferred the function of implementing national government policies on environmental conservation and natural resources including soil and water conservation on the County Governments. This has been interpreted in various ways by the County Governments. The first approach is the direct regulation of sand mining. For example the *Kwale Quarrying Act No. 11 of 2016* regulates all activities around quarrying for common minerals. The County Act includes some of the input control measures set out in the *National Sand Harvesting Guidelines 2007*. It establishes a permitting and licensing regime for all quarrying and transportation of all common minerals and cess payment for transportation of common minerals from or to other counties. Fees and charges shall be imposed on quarrying and dealing in common minerals.

Similarly, the *Machakos County Management of Quarrying Activities Act No. 4 of 2016* establishes a permitting system based upon public participation and which expires at the end of the calendar year. The application for a permit requires a site plan, restoration plan, EIA, NEMA clearance, insurance and the prescribed fees. The *Makueni County Sand Conservation and Utilization Act, 2015* establishes a comprehensive regulatory framework comprising of institutional mandate placed on the Sand Conservation and Utilization Authority which supervises the sector, licences sand operations, handles grievances and promotes sustainable use of sand; the Act also establishes Sub- County Sand Management Committees and at the community level Sand Resource Users Association, it identifies the main actors as sand dealers (transporters and traders) who must be licensed to operate and sand loaders (harvesters) who must be registered and licensed to operate, it also licences sand vehicles, it designates extraction sites, roads and conservation sites which are no take zones, it establishes a County Sand Conservation Fund for mitigation of environmental degradation, it includes input control measures set out in the Sand Harvesting Guidelines 2007, it bans extraction on riverbanks. The Authority has powers to set pricing guidelines and receive revenues (25%) which shall be shared with the County Government (20%),

[53] Fourth Schedule, Part 2 No. 10

Conservation Fund (50%) and local community (5%). Most counties do not have any legislation on quarrying.

The second approach widely adopted by counties is to impose a cess on the transportation of sand from the County through the annual Finance Act based on powers conferred by Article 209 (3) of the Constitution. This approach is based on the size of the vehicle and tonnage and enables the county government to address the major damage to road infrastructure caused by sand trucks. In the case of *Bustra Saving and Credit Co-operative Society Limited & another v County Government of Tharaka Nithi County [2019] eKLR*[54] the Court confirmed the jurisdiction of the county government with respect to its taxation powers over transportation on county roads. The third approach is cess on the product for each stone or tonne of sand[55].

4. Way Forward

The Sand and Sustainability Report[56] identifies gaps in the governance of sand globally which are caused by complex and opaque value chains, informality, lack of data, poor monitoring and enforcement where regulations exist due to capacity constraints and corruption. A brief outline of the governance structure for sand in Kenya above indicates similar gaps in terms of a multiplicity of regulators at both national and county levels of government, weak property regime, uncertainty regarding the application of the Mining Act, multifarious prescriptive laws, low participation of the private sector and 'third parties', inadequate data on the sector, weak conflict resolution mechanisms, low compliance, amorphous appellation system, and minimal and haphazard enforcement.

[54] '*30. There is however no dispute that the Respondent is levying cess/fees on transportation of any product and not on the product itself. Therefore it matters not whether the transporter is ferrying "minerals" within the meaning of Mining Act, sand or even cabbages to various markets within or outside the County. The cess/fees imposed by County Government on transportation of goods within the areas of their jurisdiction in contemplated under Article 209 (4) of the Constitution and is legitimate so long as it is a service charge backed by the necessary County legislation. This issue has been subject of a number of decisions in this County.'*

[55] The Mombasa County Finance Act

[56] Supra n.7, P. 6

The numerous sites of unsightly open cast quarries found across the country are clear evidence of environmental degradation caused by sand harvesting. The increasing number of cases referred to litigation in the High Court indicates some weakness in the governance structure. The murders, burning of sand trucks, threats of violence by cartels and similar incidents reported by local and international media as 'sand wars'. The rising cases of 'sand wars' bear some resemblance to the phenomenon referred to as 'conflict minerals' in artisanal mining that became of such significance that the US Congress passed the Dodd Frank Act[57] and the Kimberly Process was created to bring the situation under some control. This indicates that the country is already in quicksand and does not yet qualify for a Sustainable Development Licence to Operate[58]. They say that when you are in quicksand, the first step is to stop moving. We need to reexamine our governance structure for sand. Some areas to be prioritized may include:

Harmonization: The governance structure is fragmented and convoluted. The harmonization and standardization of the legal governance structure is vital to lay the right foundation for other interventions.

Build knowledge: To build up knowledge of the sector we need to take an inventory of our resources, production rates and demand for sand, number employed in the sector and harvesting sites as no formal statistics exist. The employment of technological approaches will achieve a level of accuracy and verifiability required.

Stakeholder Dialogue: An urgent national discourse bringing together views from regulators, county governments, private sector, civil society, local communities, sand harvesters/loaders, traders, transport owners, manufacturers, realtors, professionals in the construction industry is required so as to define a roadmap that takes into account the country's developmental needs.

[57] S. 1502 Dodd Frank Wall Street Reform and Consumer Protection Act, accessed at https://www.investopedia.com/terms/d/dodd-frank-financial-regulatory-reform-bill.asp on 3rd March, 2021

[58] Ibid n. 35, p. 529, In India the sand mafia has compromised the regulatory system through corruption and violence in order to supply the black market for sand which is sustained by the insatiable demand for the resource.

Circular Economy: The encouragement of recycling, reuse and reduce is possible in the construction industry. Locally available best practices for rehabilitation of quarries such as Haller Park are globally acclaimed. Professional bodies, cement companies, realtors and other stakeholders in the construction industry have a role to play in promoting new building technologies including recycling construction materials. The proposed *Sustainable Waste Management Bill* will provide the necessary support for the production and use of recycled and secondary aggregates.

Financial aspects: The governance structure must identify the appropriate incentives and financing models to encourage and support alternatives, innovation and indigenous solutions. Green procurement practices are essential since government is the largest procuring entity in the country.
Regulatory approaches: The adoption of the integrated and community based governance approaches[59] already in existence in one form or another in other Natural Resource governance structures in the country[60] can be retooled to avoid the calamitous quicksand scenario the sand sector is rapidly falling into. An important focus must include grievance handling, monitoring and responsive enforcement[61] mechanisms.

Capacity building: At community level this requires undoing existing societal perceptions that sand is abundant and available. It requires to demonstrate the existing threats of exploitation and what the short term impacts of reduction or exhaustion of sand will entail both economically

[59] Ibid n.35, p. 539 *'The community-based governance system shifts most of the control of the natural resource to community control rather than political control. The community has a personal interest in mining the sand sustainably so it is not depleted. Sand mining provides jobs to community members, which benefits the community as a whole. This provides the community the opportunity to build better infrastructure around the community with the sand. The effects of unsustainable sand mining on the community's water and food supply, as well as the heightened threat of flooding, also provide the community with an incentive to protect their environment by protecting their resources.''*

[60] Dr. Kariuki Muigua, 'Integrated Natural Resources and Environmental Management for Sustainable Development in Kenya'' accessed at https://kmco.co.ke/ on 29th April, 2021

[61] Regulatory theory: foundations and applications, Peter Drahos (editor), ANU Press, 2017, p. 5

and environmentally. Capacity building programs[62] should be broad based and continuous in view of the dynamic nature of the sector.

The SDLO framework is relatively new[63]. However it is apparent that in the sand sector there are gaps that require to be systematically identified and contextualized benchmarks developed. The SDLO provides a 'North Star' to guide efforts to achieve the sustainable development of the sand sector.

[62] The ACP-EU Development Minerals Programme offers training on development minerals available at http://developmentminerals.org/index.php/en/

[63] Supra n.12, P. 75 It is contended that development minerals may require a distinct governance framework from other minerals and metals.

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The Intersection Between Human Rights Law and International Environmental Law; An Analysis of Contemporary Developments Relating to The Growing International Recognition of Rights of Nature

By: ***Polycarp Moturi Ondieki****

Abstract

Incontestably, the mutual interrelationship between humankind and the environment is as thick as thieves.[1] Humans require water, air, and survival food; therefore destruction, contamination, and adulteration of these essentials throw up threats to the health, wellbeing, and life of human beings.[2]Wherefore, human rights law and environmental law are attributes of the common interest of humanity.

This article sets to analyze how the earth has been facing a plethora of insurmountable deleterious environmental challenges such as pollution, loss of biodiversity, global warming, and desertification. Further, the article will show how, most global environmental issues have been dealt with through the international environmental law system. The article will further conceptualize how the global community has realized what needs to be done to tackle the alarming conundrum of environmental degradation.[3] One of the worldly-wise ways of dealing with the effects of environmental degradation is using the human rights system. This system offers revolutionary legal mechanisms required to tackle the drastic effects of human activities on the environments

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[1] Kiss, Alexandre, & Dinah Shelton. Guide to international environmental law 238.
[2] Ibid.
[3] John H. Knox, Climate Change and Human Rights Law 163-218.

and the human rights implications of ecological degradation.[4] One of the ways through which the human rights system helps in tackling environmental issues in the international arena is through the empowering of individuals and states to safeguard the interests of both human rights and the ecosystem through various instruments and bodies.[5] Finally, the article will analyze the challenges that face the human rights-based approaches and the remediations needed to ensure a sustainable balance and progression between humans and the environment.

1. Introduction

In the terminal decades of the twentieth century, the global environment became a serious concern.[6] During these periods several environmental disasters were experienced stimulating the consciousness that environmental degradation had reached catastrophic proportions.[7] Some of the worst environmental catastrophes that were experienced in the world during this period include the 1984 Union Carbide Accident in Bhopal, India that killed over two thousand people and injuring more than fifteen thousand others;[8] the 1986 Nuclear Meltdown in Chernobyl that led to massive soil and water contamination threatening food supplies in Eastern Europe and the erstwhile Soviet Union and loss of lives;[9] the 1986 poisonous chemical spill from the Basel chemical plant which resulted into the discharge of dangerous chemicals into the Rhine river;[10] and the prodigious amount of destruction that was caused by the Gulf War in 1991.[11] These man-made calamities when

[4] Quirico, Ottavio,& Mouloud Boumghar. Climate change and human rights: an international and comparative law perspective.
[5] John H. Knox, "Climate Change and Human Rights Law 163-218.
[6]Nanda, V. & Pring, G.R., 2012. International environmental law and policy for the 21st century 595.
[7]Ibid.
[8] Nytimes.com. 2020. THE BHOPAL DISASTER: HOW IT HAPPENED (Published 1985).
[9] World-nuclear.org. 2020. Chernobyl | Chernobyl Accident | Chernobyl Disaster - World Nuclear Association.
[10] Nytimes.com. 2020. MERCURY A KEY CONCERN IN RHINE SPILL (Published 1986).
[11] Roberts, Adam. "Environmental destruction in the 1991 Gulf War." 538-553.

augmented with other factors such as urbanization, and industrialization, have caused drastic social, economic, and physical destruction to the human environment.[12]

With expanding environmental awareness, the international community has been prompted to deliberate about the inauspicious impact of human activities on the environment and to address the consequential challenges.[13] World leaders have for a number of times convened in various conferences such as the 1992 United Nations Conference on Environmental Development in Rio De Janeiro,[14] and the 2002 United Nations World Summit on Sustainable Development in Johannesburg.[15] Among the suggested responses towards curbing environmental deterioration is the recognition of individuals' environmental rights.[16]

Although many of these international instruments adopted during these meetings are not binding, many states have reaffirmed their provisions without reservations. This can be witnessed in the recognition of environmental human rights by many states both developing and developed in their constitutions and municipal laws.[17] International and regional judicial bodies have also greatly contributed to advancing the connection between human rights law and international environmental law as will be illustrated herein under. This can be witnessed through the cases that have been brought before various human rights bodies such as the European Court of Human Rights(ECHR), the Inter-American Commission on Human Rights(IACHR), and the Human Rights Committee which have been able to tackle

[12] Kaplan, R. D. "The Coming Anarchy in The Atlantic Monthly."
[13] Nanda, V. and Pring, G.R., 2012. International environmental law and policy for the 21st century 597.
[14] Ibid, pg. 97.
[15] Ibid.
[16] Hajjar Leib, L., 2011. Human rights and the environment: philosophical, theoretical and legal perspectives 2.
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environmental issues through the interpretation of the various respective human rights.

This paper analyses the influence of human rights law on international environmental law. Additionally, the paper will conceptualize and contextualize how various international and regional instruments have been interpreted by different regional and international courts and tribunals in showing the effects of various humans on international environmental law. Finally, this article will show the various challenges associated with human rights-based approaches in the international context and the possible solutions on the challenges.

2. Influence of Human Rights Law on International Environmental Law

Many models and theories have been advanced against the background of human rights law concerning the protection of the environment. During its inception, the doctrine of human rights only concentrated on two theories; the natural theory of law and the positive theory of law.[18] The former postulated that human rights law emanated from the inherent dignity of the human being while the proponents of the latter opined that the law emanated from the will of the state.[19] Continued development brought about more theories such as utilitarianism which advocates for actions that promote happiness and castigates actions that cause harm or unhappiness among the majority.[20] Additionally, the theory of socialism was also advanced by proponents like Karl Marx to fill the gap that had been created by natural law.[21] The theorists propounded that the natural law and positivist rights were made for the bourgeois hence ignored the benefits of liberating humans of the socio-economic factors such as labor and wealth production.[22] This development led

[18] William A. Edmundson, An Introduction to Rights, Introductions to Philosophy and Law Series.
[19] Ibid.
[20]Bentham, Jeremy. "Critique of the doctrine of inalienable, natural rights." 489-534.
[21]Cranston, Maurice. "Are there any human rights?." 1-17.
[22] William A. Edmundson, An Introduction to Rights, Introductions to Philosophy and Law Series.

to the formation of socio-economic rights in the early 19th century.[23] Although the individual natural rights did not vanish, they were viewed through the utilitarian and socialist lenses as a medium of the public good.[24]

More contemporary theories have been advanced to serve the issue of human rights in the relation to international environmental law. One such theory is the interest theory of legal rights which states that rights are created to serve the concerns of the addressee.[25] Accordingly, through the application of this theory, it is practicable for the human rights realm to include nature and ecosystems and right bearers.[26] These theories are the backbone of the human rights system and they help in showing that human rights can extend their dignity beyond themselves. Therefore, there are no theoretical obstacles that can prevent the incorporation of environmental interest in the system of human rights.[27]

On the same wavelength, various human rights approaches have been fronted to deal with the link between human rights law and international environmental law.[28] These approaches include the expansion of the existing human rights, the dependence on procedural rights, and the contextualization of the discrete human right to the environment.[29] The contemporary interconnection and influence of human rights law on international environmental law has been philosophically conceptualized through three theories which include; the expansion theory, the environmental democracy theory, and the genesis theory.[30] The first two propositions correlate with the 'greening' of the prevailing procedural and substantive human rights, while

[23] Ibid.
[24] Ibid.
[25] Taylor, Prudence E. "From environmental to ecological human rights: A new dynamic in international law." Geo.
[26] Ibid.
[27]Cranston, Maurice. "Are there any human rights?." 1-17.
[28]Carl Wellman, "Solidarity, the Individual and Human Rights," 641.
[29] Ibid.
[30] Andre Mokkelgjerd, "Linda Hajjar Leib, Human Rights and the Environment 69-150.

the genesis theory is concerned with the emergence and development of the distinct right to environment in international law.[31]

2.1. Expansion Theory

This theory deals with the greening of well-established rights such as the right to health, the right to privacy, the right to life, and the property right.[32] The expansion and reinterpretation of these rights have always been important in the protection of international environmental issues.[33] They have also helped in creating a way for future recognition of the distinct right to the environment.[34] These rights are also referred to as the first-generation rights.[35] They define individual freedom that governments have undertaken to defend and protect.[36] These rights have been advanced in different ways hence showing the growing connection between human rights and international environmental law.

The right to life is the backbone of all other human rights. Undeniably, an endangered or terminated life cannot appreciate other rights.[37] This right is recognized in the international arena as a peremptory norm that should not be derogated from.[38] Moreover, the right has been recognized by various international and regional instruments such as Article 3 of the Universal Declaration of Human Rights(UDHR), Article 3 of the International Convention of Civil and Political Rights(ICCPR), Article 2 of the European Convention on Human rights(ECHR), Article 4 of the American Convention on Human Rights(ACHR) and Article 4 of the African Convention on Human and People's Rights(Banjul Charter).

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[31] Ibid.
[32] Lauren, Evolution of International Human Rights, 711–712.
[33]Lauren, Evolution of International Human Rights, 711–712.
[34] Thomas Buergenthal, "The Normative and Institutional Evolution of International Human Rights,"703–723.
[35] Nanda, Ved, and George Rock Pring. International environmental law and policy for the 21st century.
[36] Ibid.
[37] Anderson, Michael R., and Alan E. Boyle. Human rights approaches to environmental protection.
[38]Ibid.

These international and regional instruments obligate states to take measures that ensure this right is adequately respected and guaranteed. A good example is Article 2 of the EHCR which requires states "not only to refrain from taking life intentionally but, further to take appropriate steps to safeguard life."[39]Additionally, General Comment 6 of the United Nations Human Rights Commission (UNHCR) elucidates that the right to life is so supreme that states should always interpret broadly.[40] It is through these provisions that the application of the right has expanded beyond the conventional derogations that emanated from public authorities to encompass environmental threats impacting the wellbeing and livelihoods of humans across the globe.[41]

Consequently, many international and regional courts and tribunals have set the motion in the connection between the right to life and environmental protection. In the case of *Sawhoyamaxa Indigenous Community v Paraguay*, the Inter-American Court of Human Rights (IACHR) adjudicated that Paraguay failed to respect the right to life of the community members "since lack of recognition and protection of their lands forced them to live on a roadside and deprived them of access to their traditional means of subsistence."[42] It is through the lack of important living conditions such as medication and necessary nutrition that any member of the community died. As such the court ruled further that, "states have a duty to create the conditions necessary in order to prevent violations of such inalienable right."[43] Accordingly, by upholding the rights of indigenous communities to their ancestral properties, the IACHR periphrastically promoted the protection of the environment for the present and future generations and preservation of nature as many indigenous communities are interlinked with their natural

[39] Churchill, R., 1996. Environmental rights in existing human rights treaties. Human rights approaches to environmental protection, 91.
[40] UN Human Rights Committee (HRC), CCPR General Comment No. 6: Article 6 (Right to Life), 30 April 1982, available at: https://www.refworld.org/docid/45388400a.html [accessed 19 October 2020].
[41]Hajjar Leib, Linda. Human rights and the environment: philosophical, theoretical and legal perspectives p.84.
[42] Sawhoyamaxa Indigenous Community v. Paraguay, *146 Inter-Am Ct HR (ser c), par. 145 (2006).*
[43] Ibid.

environment.[44] Additionally, in its report on the status of the human rights situation in Ecuador, the IACHR stated that " the realization of the right to life, and to physical security and integrity is necessarily related and in some ways dependent upon one's physical environment."[45] From this holding, it is outrightly clear that the court expanded the scope of the right to life beyond the provisions of Article 4 of the ACHR by recognizing and accommodating environmental aspects.

In the *Inuit case*,[46] the Inuit Circumpolar Conference filed a petition to the IACHR against the United States (US) for the release of greenhouse gases (GHG) hence leading to climatic changes in the Arctic region. This in turn affected the lives of the people living in the Arctic region. Since the US was not a party to the ACHR, the petitioners relied on the American declaration on the rights and duties of man (ADRDM) which recognizes the right to life in its Article 1. They contended that climate change has caused massive degradation in the Arctic region hence leading to loss of species and diminishing of food reserves and as a result, their lives were threatened.[47] Although the petition was rejected because the information provided by the petitioners was inadequate to decide,[48] the case stands out as a significant precedent with invaluable deliberations showing the inextricable linkage between the right to life and international environmental law.

Equivalently, the African Commission on Human and People's Rights (AComHPR) gave a landmark ruling on the relationship between human rights

[44] Ibid no. 44.
[45] The Report on Human Rights Situation in Ecuador, *Inter-American Commission on Human Rights, OEA/Ser.L/V/II.96, Doc.10 rev.1(1997), chap. VIII.*
[46] Petition to the Inter-American Commission on Human Rights Seeking Relief from Violations Resulting from Global Warming Caused by Acts and Omissions of the United States (7 December 2005).
[47] Petition to the Inter-American Commission on Human Rights Seeking Relief from Violations Resulting from Global Warming Caused by Acts and Omissions of the United States (7 December 2005).
[48]Petition to the Inter-American Commission on Human Rights Seeking Relief from Violations Resulting from Global Warming Caused by Acts and Omissions of the United States (7 December 2005).

and the environment in the Ogoniland case.[49] The case concerned an alleged violation of the right to life, the right to health, and the right to a general satisfactory environment as outlined in Articles 2, 16, and 24 of the Banjul Charter respectively.[50] In this case, the Nigerian government through a state-owned company conducted an oil operation in a manner that was detrimental to the environment hence causing severe health problems to the neighboring communities. The African commission ruled against the Nigerian government and stated that the government was supposed to protect the environment and the lives of people in Ogoniland by ensuring further oil development operations and providing necessary information to the affected people on the possible health environment effects from the operations.[51]

Another important human right in this category is the right to privacy. This right is recognized in various international instruments including Article 17 of the ICCPR which states that "no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence…"[52] this is also reiterated in Article 8 of the European Convention and Article 11 of the ACHR. Several cases have been brought forth before international and regional courts where environmental perils on the right to privacy.

In the case of *Guerra and others v Italy*, the ECHR sagaciously applied Article 8 of the European Convention and held that Italy had violated the applicants' right to privacy and family life by not providing them with relevant environmental information that would allow them to assess the environmental effects of staying next to a chemical factory.[53] The applicants were living one kilometer from a fertilizer factory that produced environmentally hazardous chemicals.

[49] The Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria (Ogoniland case), Case No 155/96 (AComHPR, 27 October 2001).
[50] African Convention on Human and People's Rights.
[51] The Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria (Ogoniland case), Case No 155/96 (AComHPR, 27 October 2001).
[52] International Convention of Civil and Political Rights.
[53] Guerra and Others v. Italy, 26 Eur. Ct. H.R. 357 (1998).

On the same note, the case of *Mcginley and Egan v United Kingdom (UK)* also advanced the linkage between the right to privacy and international environmental law.[54] The petitioners, in this case, argued that the UK violated Article 8 of the European Convention when it failed to provide necessary information to them on the effects of nuclear tests that were taking place on Christmas Island in 1954.[55] The petitioners were members of the armed forces stationed on the Island. The Court rejected its application by stating that the government had provided the required information. However, the Court noted that "where a government engages in hazardous activities, respect for private and family life under Article 8 requires that effective and accessible procedure be established which enables such persons to seek all relevant and appropriate information."[56]

The right to health is another significant civil and pollical right that falls within this category. A healthy ecosystem is fundamental for health and well-being.[57] The International Covenant on Economic, Social, and Cultural Rights(ICESCR) states that state parties should recognize the right of everyone to a satisfactory living standard, which includes enough food, clothing, housing, and uninterrupted enhancement of living standards.[58] This also includes the right to be cushioned from hunger.[59] Incontestably, the attainment of the right to health is not only associated with the provision of better medical care but also encompasses the protection of the environment from hazards such as the release of contaminated sewage into water bodies, food adulteration, and radioactive pollution.[60] Other fundamental instruments that recognize the right to health include, United Nations Convention on the Rights of a Child,[61] and the Banjul Charter.[62]

[54] McGinley and Egan v. United Kingdom, 27 E.H.R.R. 1 (1998).
[55] Ibid.
[56] McGinley and Egan v. United Kingdom, 27 E.H.R.R. 1 (1998).
[57] Andre Mokkelgjerd, "Linda Hajjar Leib, Human Rights and the Environment 89.
[58] International Covenant on Economic, Social, and Cultural Rights, Article 11.
[59] Ibid.
[60] Thorme, Melissa. "Establishing environment as a human right." 319; Hajjar Leib. Human rights and the environment: philosophical, theoretical and legal perspectives.
[61] United Nations Convention on the Rights of a Child, Article 24.
[62] African Convention on Human and People's Rights., Article 16.

In its General Comment 14 on the right to health and highest standard of living, the Committee on Economic, Social and Cultural Rights (CESCR) provided a broader explication of the right to health by stating that "it is an inclusive right extending to the underlying determinants of health, such as access to safe and potable water and adequate sanitation, an adequate supply of safe food, nutrition, and housing, healthy occupational and environmental conditions."[63] This Comment shows that the right to health is indistinguishably linked to linked and fixated to the environment.

In the case of the *Marangopoulos Foundation for Human Rights v Greece*,[64] the European Committee on Social Rights (ECSR)through its recommendations, found the linkage between the right to health and the environment. The Committee found that Greece violated the right to health as it had failed to take precautionary measures to prevent environmental pollution caused by lignite mining and power stations powered by lignite whose effects were likely to cause air pollution and climate change in the area. The Committee took into consideration international and European legal frameworks such as the ECHR and the European Social Charter (ESC) and significantly highlighted Greece's non-compliance.[65] This is an important precedent as it highlights the connection between the rights to health and the right to life with environmental degradation in the realm of international law. Additionally, in the case of *Yanomami v. Brazil*, [66]the petitioners who are an indigenous community in the amazon filed a case in the IACHR against brazil. The members of the community argued that the construction of the Trans-Amazonian Highway across their homelands without compensation infringed on their rights. This highway led to mining activities in the area which in turn led to the unreasonable displacement of the community members. This subjected them to diseases such as influenza and tuberculosis. The petitioners

[63] General Comment 14: The Right to the Highest Attainable Standard of Health, *Committee on Economic, Social and Cultural Rights, UN Doc E/C.12/2000/4 (2000).*
[64] Marangopoulos Foundation for Human Rights (MFHR) v Greece, *Collective Complaint No 30/2005*.
[65] Ibid.
[66] Yanomami Community v. Brazil *Inter-Am Comm HR, Brazil, Resolution No. 12/85, Case No. 7615(1985).*

argued that their right to life and personal security and the right to health and wellbeing as provided by the American Declaration of the Rights and Duties of Man was greatly infringed upon.[67] Although the Commission did not stop the Brazilian government from continuing with the environmental degradation, it ruled in favor of the community and proposed that the Brazilian government should take measures to protect the lives and health of the member of the community and ensure demarcation of boundaries that protected the communities from infringement and displacement.[68] This shows that the destruction of the environment can lead to severe health effects on individuals dependent on such an environment and individuals can use the right to health to protect their environmental rights.

Additionally, the property right is another important right in which landmark cases have been decided to advance the relationship between this human right and the environment. Particularly, some of the cases include, the Kichwa People of Sarayaku v Ecuador,[69]Maya indigenous communities of the Toledo District (Belize),[70] Mayagna (Sumo) Awas Tingni Community v Nicaragua[71] , and the Indians of Yanomami case.[72] These cases were caused by environmental degradation resulting from the extraction, logging, infrastructural developments, and mining in the ancestral lands of indigenous communities respectively. This led to a violation of the right to property of the people as per Article 21 of the ACHR.[73] The IACHR interpreted the rights

[67] American Declaration of the Rights and Duties of Man; Yanomami Community v. Brazil, *Inter-Am Comm HR, Brazil, Resolution No. 12/85, Case No. 7615(1985).*
[68] Yanomami Community v. Brazil *Inter-Am Comm HR, Brazil, Resolution No. 12/85, Case No. 7615(1985).*
[69] Kichwa Indigenous People of Sarayaku v. Ecuador, 2012 Inter-Am Court H.R. (ser C) 245 (2012).
[70] Maya Indigenous Community of the Toledo District v. Belize, 2004 I.A.C.H.R. Case 12, 2004 Case 12 (2004).
[71] Mayagna (Sumo) Awas Tingni Community v. Nicaragua, 2001 Inter-Am. Ct. H.R. (ser. C) 79, 2001 Inter-Am Court H.R. (ser C) 79 (2001).
[72] Yanomami Community v. Brazil *Inter-Am Comm HR, Brazil, Resolution No. 12/85, Case No. 7615(1985).*
[73] American Convention on Human Rights.

widely including the communal customary property of the communities and the right to life under Article 4 of the ACHR.[74]

2.2. Environmental Democracy Theory

It is through this theory that democratic governance is introduced into the field of environmental sustainability.[75] Procedural rights such as the right to information, right to participation, and access to justice are applied in the realm of international environmental law to empowers individuals, challenge decisions and influence international resolutions and policies.[76]These rights are alternatively referred to as the second-generation rights and the goal is to help individuals seek affirmative action from the authorities.[77]

These procedural rights are important in the realm of international human rights law. They have also been recognized in various international and regional instruments including the Universal Declaration of Human Rights(UDHR) which sets out some of the rights as follows; right to an effective remedy in tribunals,[78] the freedom of expression, and opinion which includes the right to receive and impart information,[79] the right to participate in government either directly or indirectly[80] and the right to be educated.[81] Equally, the ICCPR recognizes rights in Articles 14, 19, and 25. Moreover, the Aarhus Convention provides for the right to environmental information and public participation in decisions that impact the environment.[82] The United National Framework Convention for Climate Change(UNFCCC) recognizes these rights by stating that, " state parties shall promote and facilitate at the national….sub-regional and regional, and in accordance with national laws and regulations, and their respective capacities public access to

[74] Ibid.
[75] Mason, Michael. Environmental democracy.
[76] Ibid.
[77] Ibid.
[78]Universal Declaration of Human Rights, Article 8.
[79] Ibid, Article 19.
[80] Ibid, Article 21.
[81] ibid, Article 26.
[82] Convention on access to information, public participation in decision making and access to justice in environmental matters, Article 1.

information and public participation."[83] This is also reiterated in Principle 10 of the Rio Declaration.[84]

Since these participatory rights are precautionary and pro-active, they help in the proper management and protection of the environment.[85] Through the participation of individuals in decision-making, they help to make good environmental decisions and averting ecological pollution. Strictly speaking, these procedural rights incorporate democratic elements that help in environmental management both in the national, and international arena.[86] Particularly, in the realm of international environmental law, these human rights give non-state actors such as non-government organizations (NGOs) to participate in global policy-making and global dispute resolution processes.[87]

The 'greening' and 'proceduralisation' of these human rights have been brought out sagaciously in the case of Maya Indigenous communities of the Toledo district,[88] the state of Belize alleged infringed on the traditional rights of the communities by allowing logging and oil exploration and mining the lands. The petitioners contended that the State failed to protect their lands at the same time, it failed to accord them an opportunity to judicially protect their traditional lands. The Inter-American Commission on Human Rights held that Belize's conduct infringed on the rights of the Maya community by threatening the natural environment of the community which in turn endangered the economic and life support of the community. This was a breach of the right to property and judicial protection as provided for in the ADRDM. Accordingly, the Commission ordered Belize to restore the property

[83] United Nations Framework Convention for Climate Change, Article 6.
[84] Rio declaration on Environment and Development.
[85]Symonides, J., 1992. Human Right to a Clean, Balanced and Protected Environment. Int'l. J. Legal Info., 20.
[86]Handl, Günther. "Human rights and protection of the environment: A mildly revisionist view." Human Rights, Sustainable Development and the Environment, San Josè de Costa Rica/Brasilia 117-142.
[87] Ibid.
[88] Maya Indigenous Community of the Toledo District v. Belize, 2004 I.A.C.H.R. Case 12, 2004 Case 12 (2004).

rights by conducting fully informed consultations with the Maya people and most essentially to restore the environmental harm suffered.[89]

Additionally, in the Center for Minority Rights Development on behalf of the Endorois Community v Kenya, the petitioners alleged that the Kenyan government forcibly removed the members of the indigenous community without any consultations to set up a game reserve on their land.[90] Additionally, there was no adequate compensation to the members of the community. This violated significant provisions of the Banjul Charter including the right to acquire justice, right to property, and the right to culture. After extensively reviewing the case, the AComHPR held for the Endorois people and stated that indeed Kenya violated their rights. one of the fundamental principles that Kenya violated is the duty not to pollute traditional environments which are provided for in the united nations on the situation of human rights and fundamental freedoms of indigenous people.[91]

Moreover, in the case of *Saramaka v Suriname,* which also involved the rights of indigenous people, the court accentuated the significance of public participation, environmental impact assessment, and access to information, and prior informed consent with regards to environmental interruptions on indigenous peoples' properties.[92] The importance of the right to information with regards to environmental exploitation was also greatly emphasized by the IACHR in the case of Claude-Reyes et al. v. Chile.[93] In this case, the court expanded on the provisions of Article 13 of the ACHR.[94]

[89]Maya Indigenous Community of the Toledo District v. Belize, 2004 I.A.C.H.R. Case 12, 2004 Case 12 (2004).
[90] Centre for Minority Rights Development v. Kenya, 2009 A.H.R.L.R. 75 (2009).
[91] Stavenhagen. The Situation Of Human Rights And Fundamental Freedoms Of Indigenous People; Centre for Minority Rights Development v. Kenya, 2009 A.H.R.L.R. 75 (2009).
[92] Saramaka People v. Suriname, Judgment of 28 November 2007, Series C No. 172, paras. 129 - 134
[93] Claude-Reyes et al. v. Chile, 2006 Inter-American Court of Human Rights (Ser. C) No. 151, para. 76–77.
[94]American Convention on Human Rights.

2.3. Genesis Theory

This theory interlocks with Ronald Rich's "indispensability theory" which talks about the right to development.[95] Proponents of this theory opine that the right to development is necessary for the enjoyment of basic human rights.[96] Therefore, just as the right to development is necessary, the right to the environment is necessary for the fulfillment of basic human rights.[97]Further, they claim that as much as the first and second-generation rights are important in preventing environmental degradation, they are limited in scope and somehow restricted.[98] Consequently, the recognition of distinct environmental rights helps in fighting human rights consequences of environmental degradation without having to supplicate the existing first and generation human rights, that would demand, "fitting the potentially round beg of environmental concerns into the square of staunchly anthropocentric human rights."[99] Plaintiffs are forced to show the connection between the unwelcome environmental element and an existing human right.[100] A good example is the case of X and Y v federal republic of Germany where the court rejected a petition filed by environmental organizations against marshlands for military purposes based on inconsistency with the European Convention.[101] The ECHR held that "no right to nature preservation is as such included among the rights and freedoms guaranteed by the convention."[102]

The rights advanced through this theory are commonly known as third-generation rights or solidarity rights.[103] They are not contingent upon the already existing human rights in the international area, nor do they replace

[95] Rich.The right to development as an emerging human right 312-320.
[96] Ibid.
[97] Ibid, pg 321.
[98] Hajjar Leib, L., 2011. Human rights and the environment: philosophical, theoretical and legal perspectives.
[99]Leib.Chapter Three. Theorisation Of the Various Human Rights Approaches to Environmental Issues. In Human Rights and the Environment 69-108.
[100] Hajjar Leib. Human rights and the environment: philosophical, theoretical and legal perspectives.
[101] X and Y v. Federal Republic of Germany, *15 Eur Comm HR 161, 161 (1976).*
[102]*Ibid.*
[103] Noralee Gibson, "The Right to a Clean Environment," 5-18.

them.[104] They have been developed due to the changing circumstances in the international arena hence prompting the need for new rights. [105]

The right to the environment has been advanced in a number of international instruments including the Arab Charter on Human Rights which recognizes the right to a healthy environment as part of the right to an acceptable standard of living.[106] On the same wavelength, the ASEAN Declaration on human rights in its Principle 28 states that " every person has right to an adequate standard of living for himself and his family including…..the right to a safe, clean and sustainable environment."[107] At the international plane, the ICESCR encapsulates the right by urging states parties to ensure the improvement of all aspects of environmental and industrial hygiene."[108] The Earth Charter in Principle 6 advocates for the actions that help in "avoiding the possibility or serious or irreversible environmental harm…" even with insufficient scientific knowledge.[109]

One of the greatest developments with regards to the right to environment is the Draft Statute for the International Environmental Agency plus the international court of the environment. The Draft Statute was presented at the 1992 UNCED conference in Rio de Janeiro.[110] Although the draft statute is not binding it provides a good pathway in the recognition of the right to environment in the international arena. This Statute makes substantive provisions for the right to environment and good relationship with other human rights. Particularly in Article 1, it states that " everyone has a fundamental right to environment and an absolute duty to preserve life on earth for the benefit of the present and future generations."[111] Additionally, the statute provides for an adjudication body which is the international court

[104] Ibid.
[105]Ibid.
[106] Arab Charter on Human Rights, Article 38.
[107] ASEAN Declaration of Human Rights.
[108] International Covenant on Economic, Social, and Cultural Rights, Article 12(2)(b).
[109] Earth Charter Initiative, The Earth Charter (2000) Principle 6, <www.earthcharterinaction.org/content>.
[110] Draft Statute for the International Environmental Agency.
[111] Ibid.

of the environment that will adjudicate on matters arising from the violation of the right to the environment.[112]The court will have jurisdiction over non-state persons and states.[113] This development is so great as it shows that the world is on the right track towards recognizing the individual right to the environment and according to significant protection for the rights. Relatably, the San Salvador protocol which was added to the ACHR expressly recognizes the right to a clean and healthy environment in its Article 11.[114]

In recognizing the right to the environment, the AComHPR in the Ogoniland case held that states are obligated to take reasonable measures to avoid pollution and environmental degradation, to promote conservation, and to ensure environmentally sustainable development and use of natural resources.[115] This ruling is outstanding as it stresses the importance of the right of communities to a clean and healthy environment through sustainable exploitation of natural resources. Additionally, it also indicates the significance of the right to information and public participation in environmental matters. On the same note, in Hamer v Belgium the ECHR held that states have put environmental protection mechanisms in place to protect their citizens, certain human rights and economic considerations should not reign primacy over environmental protection.[116] Additionally, in the case of Mangouras v Spain that concerned an environmental disaster when an oil tanker prestige ran aground at the Galician coast in 2002 discharging seventy thousand gallons of oil into the Atlantic ocean, the ECHR adjudicated that when determining bail, " the disastrous environmental consequences" of the

[112] Ibid.
[113] Ibid.
[114] Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social, and Cultural Rights of 14 Nov. 1988 (Protocol of San Salvador).
[115]The Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria (Ogoniland case), Case No 155/96 (AComHPR, 27 October 2001).
[116] Hamer v. Belgium, Judgment of 27 November 2007, ECHR Application No. 21861/03, para. 79.

prestige disaster should be one of the important factors to be taken into account in determining the seriousness of the offense.[117]

Through the judicial interpretation of various treaty provisions, it is trite to say that a substantial amount of progress has been made towards the fusion and assimilation of human rights norms and international environmental values. Accordingly, the interaction between international environmental law and human rights law will continue to loom large in the international law arena. Nevertheless, these human rights-based approached to tackling environmental issues have a number of challenges.

3. Challenges Associated with The Application of Human Rights-Based Approaches in The International Context

Some of the challenges associated with the applicated of these human rights-based approaches in the international environmental law context include anthropocentricity, definition, *forum non conviniens,* jurisdictional competition, fragmentation of international instruments and *locus standi*. This article will focus on the first four.

3.1. Anthropocentricity

One of the challenges associated with the application of the human rights model in the realm of international environmental law is the contextualization of human rights as environmental rights. This leads to an anthropocentric prejudice on the environment hence offering no assurance against global environmental degeneration.[118] Put differently, the anthropocentric nature of human rights concentrates on the effects on humans rather than the ecosystem itself.[119]

[117] Mangouras v. Spain, ECHR Application No. 12050/04, Grand Chamber, Judgment of 28 September 2010, para. 92.
[118] Acevedo, The Intersection of Human Rights and Environmental Protection in the European Court of Human Rights 437; Birnie, Patricia W., & Alan E. Boyle. International law and the environment 279
[119] Birnie, Patricia W., & Alan E. Boyle. International law and the environment 268-334.

This was well put in the case of *Guerra and other v Italy* where the ECHR held that when individuals seek the protection of environmental interest through the incantation of privacy rights, these individuals ought to invoke such a right when such an environmental effect or pollution impacts on them directly and severely.[120] Moreover, the ECHT reiterated that there should be a very strong causal link between environmental injury and the polluting factory.[121] From this case, it can be deduced that the interpretation of human rights is only concerned with the human effects and not the environment. Almost always, one has to strongly indicate that they suffered from specific pollution. This even if the environment suffered and no right was infringed upon, there will be no remedy.

Preventing anthropocentrism, States should embrace, adopt, and recognize nature as legal subject or person both in the international arena and at the domestic level.[122] Although some States such as Ecuador have been able to address this,[123]more needs to be done across the globe by envisaging the possibilities nature can provide as a legal person with its rights.[124] During the adoption of more international environmental instruments, the rights of nature should be explicitly recognized and embraced in such instruments to ensures a wholistic respect for nature in end.

3.2. Definitions

The difficulty of defining terms and contextualizing them is another challenge associated with the application of human rights-based models in international environmental law. Particularly, understanding terms such as 'environmental rights' have proved to be a tall order not only to the courts but also to the experts.[125] On the one hand, these terms may be elucidated to mean the rights

[120] Guerra and Others v. Italy, App. No. 14967/89, 26 Eur. H.R. Rep. 357(1998).
[121] Guerra and Others v. Italy, App. No. 14967/89, 26 Eur. H.R. Rep. 357(1998).
[122] Kersten, Jens. "Who Needs Rights of Nature?" *RCC Perspectives*, no. 6 (2017): 9-14. Accessed April 29, 2021. http://www.jstor.org/stable/26268370.
[123] Ecuador Constitution, Articles 71 & 74.
[124] Kersten, Jens. "Who Needs Rights of Nature?" *RCC Perspectives*, no. 6 (2017): 9-14. Accessed April 29, 2021. http://www.jstor.org/stable/26268370.
[125] Nanda, V.& Pring. International environmental law and policy for the 21st century.

of elements of the ecosystem such as animals. Conversely, they may mean the right of humans as regards the caliber of the environment they are living in. This begs the question as to what movement would be an environmental infringement be inferred as a human right violation?[126]

Some of the instances where this definition perplexity has been witnessed include the United Nations Sub-Commission which referred to the right to the environment as, "healthy and flourishing environment," or a "satisfactory environment" in its report and the right to a secure, healthy, and ecologically sound environment" in its draft principles.[127] This confusion may sometimes make it difficult for one to receive justice as international courts and tribunals take a lot of time grappling with the meaning of these terms.[128]This greatly slows the progression and development of human rights law on the international environmental law plane.

3.3. Forum Non Conveniens

The principle of *forum non conviniens* doctrine is a discretionary power that allows judicial authorities to deny jurisdiction in cases or matters related to a foreign land or the denial of transboundary access to justice on the basis that domestic laws do not have extraterritorial application.[129] Sometimes the application of human rights models in the international plane is difficult. One of the reasons for this is the non-uniformity of the state's adherence to certain international instruments. A good case in point is where the US not a party to the ACHR hence bringing a case before the AICHR against the US will be a problem.[130] That's why in case of in the Inuit case the court was forced to use the ADRDM which the US is a party to.[131]

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[126] Ibid.
[127] UN Commission on Human Rights, Human Rights and the Environment.
[128] Birnie, Patricia W., & Alan E. Boyle. International law and the environment 268-334.
[129] Ibid, pg.306.
[130] American Convention on Human Rights.
[131]Inuitcircumpolar.com. 2020. Inuit Circumpolar Council – United Voice Of The Arctic. [online] Available at: <https://www.inuitcircumpolar.com/?auto_slide&ID=16&Lang=En&Parent_ID> [Accessed 27 October 2020].

Additionally, despite the principle of non-discrimination being considered advanced by several international instruments such as the IACHR, the principle of *forum non conviniens* is still applied in certain cases. In In re Union Carbide Corporation Gas Plant Disaster at Bhopal, the United States' courts declined to hear the case on grounds of *forum non conviens* and stated that Indian courts were the best placed to hear the matter.[132] It is through the same rule that made the Trail Smelter case to end up in international arbitration and not Canadian courts.[133] Another example is the Dagi v Broken Hill Proprietary Co Ltd, where indigenous communities who had suffered harm from mining by an Australian company in new guinea were denied access to justice in new guinea hence were forced to apply to Australian courts where they were finally heard.[134]

From these cases, it is outrightly clear that the application of human rights models in the international arena may be difficult at times. Moreover, these cases were only concerned about human rights and the harm they suffered, no one cared about the environmental effects at large. Since the environment is part and parcel of humanity whenever such cases activate the bureaucracies of *forum non-convineins* should not be invoked as the overall goal of protecting the environment will not be achieved. Curtailing the right to justice causes more violations of important human rights such as the right to the environment.

One of the best ways to avoid the issues of *forum non coviniens* in the protection of human rights is the regulation of jurisdiction and the recognition of judicial pronouncements and their enforcement in both civil and commercial at the international area.[135] This will culminate into easy access of justice by transboundary litigants and excluding reliance on *forum non*

[132] In re Union Carbide Corporation Gas Plant Disaster at Bhopal 634 F Supp 842 (1986)
[133]Trail Smelter Arbitration (US v Canada) 3 RIAA 1905 (1941.
[134] Dagi v Broken Hill Proprietary Co Ltd (1997) 1 Victoria Reps 428.
[135] Birnie, Patricia W., & Alan E. Boyle. International law and the environment, pg 345.

conviniens as an exclusionary doctrine.[136] This is issues of jurisdictional limits has been applied in a number of international treaties hence making access to environment justice in those jurisdiction easy. A good example is the Aarhus Convention which requires parties to grant access to information, justice and decision making without discrimination based on citizenship or domicile.[137] This provision of the Convention ensures that environmental human rights cases are not dismissed based on the aspect of *forum non conviniens*.[138] It also reduces the denial of jurisdiction as a result of extraterritoriality.[139]

Accordingly, states need to adopt treaties and agreements that ensure the issues of *forum non conviniens* never arise on transboundary environmental human rights cases. Courts should also adopt these principles with goal of protecting environmental rights. A case resulting from the Sandoz chemical spillage in the Rhine River good precedent on this issue and it was successful determined without resorting to issues of extraterritoriality.[140] The case of Michie v Great Lakes Steel Division also judicious avoided the issues of *forum non conviniens* by allowing Canadian plaintiffs to bring a tort action in the united states as a result of transboundary air pollution.[141]

3.4. Jurisdictional Competition

In the recent past, a large number of regional and international environmental agreements have been developed in isolation from each other.[142] This occurrence has caused treaty snarl-up causing various overlaps both us substantive regulations and institutional compositions.[143]Most of these

[136]Ibid.
[137] UNECE Convention on Access To Information, Public Participation In Decision Making And Access To Justice In Environmental Matters (Aarhus Convention), Article 3(9).
[138] Ibid.
[139] Ibid.
[140]Francioni, Francesco, and Tullio Scovazzi, eds. *International responsibility for environmental harm*. London: Graham & Trotman, 1991,pg 429.
[141] *Michie v Great Lakes Steel Division* 495 F 2d 213 (1974).
[142] Stephens, Tim, and Timothy Stephens. International courts and environmental protection.
[143]Wolfrum, Rüdiger, and Nele Matz. Conflicts in international environmental law.

duplications are favorable to each other as most instruments employ comparable principles on the same issues.[144] However, some overlaps can cause challenges if they comprise differing prescriptive principles and rules. An example of treaties where such overlaps exist is the Montreal Protocol on the ozone layer and the Kyoto Protocol of the framework convention on climate change. these two instruments are based on common aspects of environmental concern and are aimed at mitigating problems in the global atmosphere. Nevertheless, within the climate change regime, hydrofluorocarbons are considered destructive and emitters of GHGs while on the other hand they are considered as alternatives for ozone layer depleting substances under the Montreal Protocol.[145]These challenges also lead to problems in various adjudicative procedures. With these overlaps, the application of human rights in the realm of international law becomes a nightmare.[146]

Additionally, these treaty contradictions have been experienced in a number of cases including the Mox Plant Dispute that was primarily concerned with the right to release information.[147] This case was about the Commission of a nuclear plant in the united kingdom.[148] The dispute presented some jurisdictional conundrums and competitions since the dispute settlements of the law of the sea convention, the European Community Treaty, and the OSPAR Convention were all actuated to tackle the issues of the conflict.[149]

The best way forward on the issue of jurisdictional competition is through coordination between competing jurisdictions.[150]The coordination should always be conducted with the aim of promoting and achieving a smooth,

[144] Artcle 11 of viona convention on ozone layer; article 14 of united national climate change convention; Biodiversity Convention, Article 27.
[145] Sebastian Obert?r, "Linkages Between the Montreal and Kyoto Pro tocols."
[146] Rosendal, G. Kristin. "Impacts of Overlapping International Regimes: The Case of Biodiversity." 95-117.
[147] Ireland v. United Kingdom, 2 E.H.R.R. 25, 25 Eur. Ct. H.R. (ser. A) 66 (1978).
[148]Ireland v. United Kingdom, 2 E.H.R.R. 25, 25 Eur. Ct. H.R. (ser. A) 66 (1978).
[149] Ibid.
[150]Stephens, Tim, and Timothy Stephens. *International courts and environmental protection*. Vol. 62. Cambridge University Press, 2009.

efficient operation of international law at the same time safeguarding the environmental rights of the affected parties.[151] This can be achieved through unilateral forum selection by state parties involved in a dispute.[152] In this process parties in a transboundary and/or international dispute collaborate in forum shopping and decide unilaterally the forum upon which the dispute on environmental rights will be solved.[153]

4. Conclusion

Unquestionably, from the foregoing illustrations, it is crystal clear that the protection and preservation of the environment as well as promoting environmental human rights is necessary for the international arena. Moreover, it is unimpeachably trite to say the interaction between the protection of human rights and the environment will continue to feature conspicuously in the international law arena.

[151] Ibid.
[152] Shany, Yuval. "Competing Jurisdictions of International Courts and Tribunals: Which Rules Govern?." PhD diss., SOAS University of London, 2001.
[153] Ibid.

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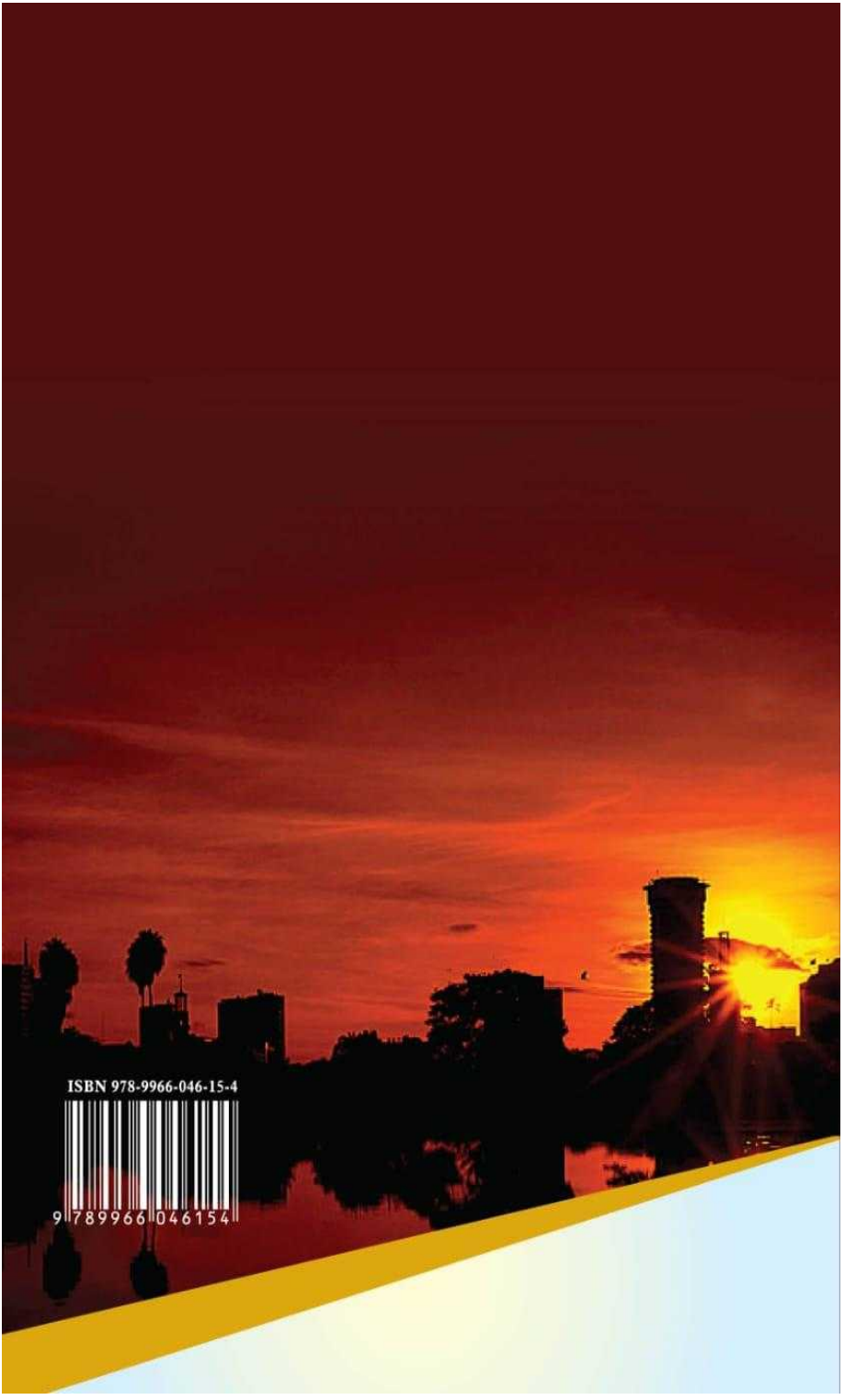
Universal Declaration of Human Rights

Convention on the Rights of the Child

United Nations Convention on the Law of the Sea

United Nations Framework Convention on Climate Change

World Development Report



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